STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2011
v	No. 296922 Macomb Circuit Court
TIMOTHY KYLE PRINCE, Defendant-Appellant.	LC No. 2009-002294-FC

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), kidnapping, MCL 750.349, armed robbery, MCL 750.529, and burning of personal property valued between $1,000 and $20,000, MCL 750.74(1)(c)(i). Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of life imprisonment without parole for the murder convictions, 25 to 60 years for the kidnapping and armed robbery convictions, and 40 to 90 months for the burning-of-personal-property conviction. We affirm in part and remand for correction of defendant's judgment of sentence to reflect a single conviction and sentence of first-degree murder, supported by two different theories.

Defendant's convictions stem from a course of conduct on March 7, 2009, that culminated in the killing of 87-year-old Dorothy Cezik in Armada Township.

I. DOUBLE JEOPARDY

Defendant initially argues that the trial court violated his constitutional protections against double jeopardy when it imposed two murder convictions and sentences for the death of one victim. Although defendant did not raise this constitutional issue in the trial court, "a double jeopardy issue involves a significant constitutional matter that will be considered on appeal regardless of whether the defendant raised it before the trial court." *People v Hill*, 257 Mich App 126, 149; 667 NW2d 78 (2003). "A double jeopardy argument presents a question of constitutional law that this Court reviews de novo." *Id.* at 149-150. But because defendant did not raise this before the trial court, this Court reviews the alleged constitutional violation for plain error that affected his substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

This Court has recognized that when a defendant obtains convictions for both first-degree premeditated murder and first-degree felony murder arising from the death of a single victim, "the appropriate remedy to protect defendant's rights against double jeopardy is to modify defendant's judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder." *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Because defendant's judgment of sentence reflects convictions and sentences for both premeditated murder and felony murder arising from the death of one victim, we remand to the trial court for the limited purpose of correcting the judgment of sentence to reflect one conviction and sentence for first-degree murder, supported by two different theories.

II. KIDNAPPING CONVICTION

Defendant next contests the sufficiency of the evidence supporting his kidnapping conviction under MCL 750.349. "[W]hether alleged conduct falls within the scope of criminal law is a question of law subject to review de novo." *People v Cassadime*, 258 Mich App 395, 398; 671 NW2d 559 (2003). We also review de novo a challenge to the sufficiency of the evidence. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

> When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.
>
> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (citations and internal quotations omitted).]

"It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The statute proscribing the crime of kidnapping in Michigan, MCL 750.349, sets forth the following:

> (1) A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:
>
> (a) Hold that person for ransom or reward.
>
> (b) Use that person as a shield or hostage.
>
> (c) Engage in criminal sexual penetration or criminal sexual contact with that person.

(d) Take that person outside of this state.

(e) Hold that person in involuntary servitude.

(2) As used in this section, "restrain" means to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts. . . .

The current statutory language, enacted by 2006 PA 159, substantially reorganized and reworded the prior kidnapping statute.

When considering whether the statutory elements exist in a particular case, we must bear in mind familiar principles of statutory interpretation. "Our fundamental obligation when interpreting statutes is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007).

> To discern the Legislature's intent, this Court must first look to the specific language of the statute. Further, this Court must presume that every word, phrase, and clause in the statute has meaning and must avoid any construction that would render any part of the statute surplusage or nugatory. Every word or phrase in the statute is accorded its plain and ordinary meaning. [*Cassadime*, 258 Mich App at 398 (citations and internal quotations omitted).]

"Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art. We consult a lay dictionary when defining common words or phrases that lack a unique legal meaning." *Thompson*, 477 Mich at 151-152.

The kidnapping statute plainly delineates that a kidnapping has taken place if a person "knowingly restrains another person with the intent to . . . [h]old that person for ransom or reward." MCL 750.349(1)(a). The Legislature defined "restrain" in two alternative components, (a) "to restrict a person's movements," or (b) "to confine the person," either of which must occur in a manner that "interfere[s] with . . . [the victim's] liberty without that person's consent or without legal authority." MCL 750.349(2). The statute does not further elaborate concerning the meaning of the terms "restrict" or "confine," and our research of Michigan case law has revealed no unique legal meaning inherent in these terms. *Random House Webster's College Dictionary* (1997) defines "restrict" as "to confine or keep within limits, as of space, action, [or] choice," and "confine" as "to enclose within bounds; limit or restrict," and "to shut or keep in; prevent from leaving a place because of imprisonment, illness, discipline, etc."

The evidence, along with the reasonable inferences arising from it, was sufficient to prove beyond a reasonable doubt that defendant knowingly restricted the victim's movements or confined the victim, without her consent or legal authority, in a manner that interfered with the victim's liberty. MCL 750.349(1) and (2). Defendant first met the victim about two weeks before her death, was seen at the victim's house on the day of her disappearance, and lived

directly across the street from the victim. When the victim and her daughter, Dorothy Wonsey, initially met defendant sometime between February 18, 2009, and March 1, 2009, defendant asked the victim for a ride to the drug store. But as Wonsey recollected, the victim asked Wonsey to drive defendant because the victim "was scared." The victim later told Wonsey that she felt "very uncomfortable" about defendant and, "I'm not going to let him in the house. I don't want him at my house." In the victim's last contact with her other daughter, Joanne Pagan, who met defendant for the first time on March 7, 2009, the victim voiced concern about defendant's "nosey" nature and his comment about the victim having been left "well off." The victim's two daughters and son-in-law all testified that after having met defendant shortly before the victim's disappearance, they repeatedly urged the victim to keep her doors locked and to call one of them for assistance if defendant appeared at her home asking for anything. According to the victim's relatives, the victim agreed to this method of operation. On two occasions during the week or so before the victim's disappearance, she did call either Joanne Pagan or Everett Pagan to advise them that defendant had come to her house seeking a ride.

Other evidence connected defendant to the victim's house, like the presence of a couch armrest cover in the portion of the victim's driveway where she always parked her pickup truck, an armrest cover identical to the one on a couch in defendant's residence across the street, which was missing one of its armrest covers when the police searched the house on March 9, 2009. Dog tracking testimony confirmed that a police dog had followed a scent trail from the victim's porch, to the armrest cover in her driveway, to cut telephone wires at the rear of the victim's house, and back across the street to defendant's front porch. The aforementioned evidence all combined to give rise to reasonable inferences that defendant had cut the victim's telephone wires before she could call for help, entered her house, gagged the victim with the armrest cover, and transported the victim away from her house while driving her pickup truck. The evidence further substantiated that defendant drove the victim in her pickup truck to the Orchard Trail, where he eventually threw the victim's body into a creek or ditch.

The record concerning the scene inside the victim's house lent further circumstantial support to the jury's finding that the victim accompanied defendant out of her house against her will. The testimony of the victim's daughters and son-in-law confirmed as highly uncharacteristic the condition in which the Pagans and the police discovered the victim's house on March 8, 2009. The victim had left a pan of cooked hamburger on the stove; her kitchen and living room lights and a television and coffee pot were all left on. The victim had also left the house without her purse or either of two hats that she habitually wore. See *People v Fullwood*, 51 Mich App 476, 480; 215 NW2d 594 (1974) (observing that a jury "could infer from circumstantial evidence that [the victim] was alive when asported," given evidence of "[t]he open and vacant bar, the absence of any sign of struggle, particularly lack of blood stains, the missing money box and cash register contents, the open newspaper, the purse and coat left behind, considered against the brutal and bloody condition of the body" when it was discovered in a local park).

All of the foregoing evidence formed a basis from which a rational jury could find beyond a reasonable doubt that defendant knowingly restricted or confined the victim, without her consent or legal authority, in a manner that interfered with the victim's liberty. MCL 750.349(1) and (2).

The remaining element necessary to prove statutory kidnapping in this case was defendant's intent to hold the victim "for ransom or reward." MCL 750.349(1)(a). The statute does not define the terms "ransom" or "reward," and, as with the statutory terms considered previously, our research of Michigan case law has uncovered no "unique legal meaning" inherent in these words. *Thompson*, 477 Mich at 151-152. According to *Random House Webster's College Dictionary*, "ransom" means "the redemption of a prisoner, kidnapped person, etc., for a price," or "*the price paid or demanded for such redemption*," and "reward" signifies "a sum of money offered for the detection or capture of a criminal, the recovery of lost property, etc.," or "something given or received in return or recompense for services rendered, merit, hardship, etc." (Emphasis added). The night Wonsey met defendant and drove him to a drug store, defendant mentioned to Wonsey, "Well, your dad must have left your mother well off. . . . You know that truck is worth a lot of money . . . ." On March 7, 2009, the last time the Pagans saw the victim, Everett Pagan remembered that as he drove defendant to a gas station and drug store, defendant "kept remarking about how nice my truck was, how nice my Fifth Wheel is," and told Pagan that he "used to own stuff." Joanne Pagan similarly remembered defendant mentioning, "Oh, you have a nice house, you have a nice vehicle. I used to have money at one time." Joanne Pagan additionally testified that the last time she saw the victim on March 7, 2009, the victim voiced concern about defendant's "nosey" nature and his comment about the victim having been left "well off." We conclude that this evidence gave rise to a reasonable inference that when defendant restricted and confined the victim, against her will and without legal authority, he intended to gain a reward or ransom, or something of value, in exchange for returning the victim. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) (noting that "because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented").

III. CJI2d 4.14

Defendant additionally complains that the trial court failed to give the standard cautionary dog tracking instruction, CJI2d 4.14, and that defense counsel was ineffective for failing to request this instruction. However, our review of the record reveals that the trial court did, indeed, instruct the jury in a manner closely paralleling CJI2d 4.14, a fact that disposes of defendant's related assertions of instructional error and ineffective assistance of counsel. The trial court's closely related instruction, which defendant and his appellate counsel have overlooked, renders defendant's instructional and ineffective assistance claims groundless.

IV. DEFENDANT'S SUPPLEMENTAL BRIEF

A. IDENTIFICATION EVIDENCE

In a supplemental brief filed in propria persona, defendant argues that the trial court should have suppressed the identification testimony of two eyewitnesses, whom defendant contends were exposed to an unduly suggestive pretrial photographic lineup. We generally review for clear error a trial court's ruling whether to admit identification evidence. *People v Kurylczyk*, 443 Mich 289, 303 (GRIFFIN, J.), 318 (BOYLE, J.); 505 NW2d 528 (1993). Clear error exists only when this Court is left with a definite and firm conviction that a mistake was made. *Id*.

"A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). A photographic identification procedure denies a defendant due process of law when the procedure qualifies as so suggestive that it gives rise to a substantial likelihood of misidentification. *Kurylczyk*, 443 Mich at 306 (GRIFFIN, J.), 318 (BOYLE, J., concurring in part and dissenting in part). A court reviewing whether a lineup is unduly suggestive should consider any relevant circumstances, as our Supreme Court noted in *Kurylczyk*, 443 Mich at 306:

> When examining the totality of the circumstances, courts look at a variety of factors to determine the likelihood of misidentification. Some of the relevant circumstances were outlined in *Neil v Biggers*, [409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972),]:
>
> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

With respect to the opportunity of eyewitnesses Gregory Rushlow and Brenda Rushlow to view defendant when they saw him on the evening of March 7, 2009, the Rushlows confirmed that near the time of the sighting they had not consumed any alcohol or medication of any kind and were wearing their prescription glasses. Both Rushlows recounted that they first saw defendant approximately 20 feet away in the headlights of their automobile, at a point in a driveway where nothing impeded their vision. The Rushlows also testified that they had a clear view of defendant's face over the course of 15 to 20 seconds, given that defendant initially had been walking toward their vehicle. The Rushlows had additional time to see defendant's face when he entered the victim's pickup truck, the interior light illuminated, and defendant sat looking toward them as he started the truck. Gregory Rushlow remembered at trial two distinctive features of defendant, that "he was stooped . . . or I thought he was suffering from osteoporosis a little bit," and his medium but husky build. Brenda Rushlow emphasized as standing out in her mind defendant's "hunched" posture, his "jowls [that] were kind of down," and his "little bit bigger nose."

Concerning the Rushlows' degree of attention, the record suggests that they were paying close attention to the driveway in front of them when they encountered defendant. Gregory Rushlow related at trial that he was focused on negotiating his sister-in-law's 1,000-foot driveway, and both Gregory Rushlow and Brenda Rushlow indicated that when their vehicle crested a rise and they observed defendant, his presence in the driveway directly in front of them startled them. Brenda Rushlow testified that she had never previously encountered another vehicle or person in her sister's driveway.

Regarding the accuracy of the Rushlows' prior descriptions of defendant, Gregory Rushlow described defendant to the police as of "medium build and stocky," and that he wore "a light color jacket and matching pants . . . . (Carhart type cloth[e]s)." In Brenda Rushlow's statement to the police, she recalled that defendant was "a stocky man" of "at least over 200

[pounds]," who wore a "three-quarter length, like a Carhart[] jacket with matching pants" in "a light color."

With regard to the level of certainty the Rushlows exhibited at the photographic lineups, neither Rushlow could pick defendant with certainty from the first lineup. The photograph of defendant incorporated into the first lineup depicts his appearance in a 2007 Michigan ID snapshot, in which defendant had worn sunglasses perched on top of his head; officers electronically removed the sunglasses from the photograph for the first lineup. The photograph of defendant included in the second lineup was taken on March 9, 2009, at defendant's booking on the instant charges. At the second lineup, the Rushlows selected defendant's photograph with certainty within approximately five seconds.[1] Brenda Rushlow denied recalling anyone having suggested before either lineup that a suspect or the victim's murderer was among the photographs. But Gregory Rushlow believed that the officer who presented the second photographic lineup uttered "something to the effect of one of the six photographs, they believed one of the six photographs was the person we saw in the driveway that night."[2] The Rushlows denied having communicated to each other in any fashion while reviewing the photo arrays, or after the first lineup expressing to each other thoughts regarding any suspect's specific position in the photos.

The Rushlows' positive identifications of defendant from the second photographic lineup took place on March 10, 2009, just three days after they saw him in the driveway on the evening of March 7, 2009. Even accepting that an officer had broached the possibility to Gregory Rushlow that the person the Rushlows saw in the driveway on March 7, 2009, likely would appear in the second photographic lineup, "the fact a victim is told the attacker is in the lineup does not alone render a lineup unduly suggestive." *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Here, the totality of the circumstances surrounding the Rushlows' opportunity to view defendant, and their detailed, similar recollections of their sighting of defendant,

[1] When presented with the photograph of defendant in the second photographic lineup, Brenda Rushlow explained that the photograph captured defendant's "stocky look and . . . the nose and . . . the jaw."

[2] Gregory Rushlow denied that a suggestion about a suspect's presence in the lineup had any influence in his selection of defendant's photograph. Rushlow explained that he selected defendant's photograph because it "is very accurate of what I actually saw that night. When . . . we came up over the hill and caught him in the headlights, he looked up, he had his hands in his pocket," and "[h]e has the feature on his face, this . . . hanging of the skin a little bit right there. And, he's got a little bit taller forehead . . . and, I immediately recognized those features on his face." Rushlow added that the photograph of defendant in the second lineup displayed a similar "angle of his head and . . . when he looked up, that's almost exactly the expression that I saw . . . on his face."

convinces us that the second photographic lineup was not unduly suggestive and that the Rushlows' identifications of defendant at trial were reliable.[3]

B. PROSECUTOR'S CONDUCT

Defendant next raises several purported instances of prosecutorial misconduct, none of which he preserved with an appropriate objection at trial.

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370, criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

"We review claims of prosecutorial misconduct case by case . . . to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We consider unpreserved claims of prosecutorial misconduct only to ascertain whether any plain error affected the defendant's substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant first argues that Sandra Berry, his housemate at the time of the victim's disappearance, lied by denying under oath that she "was . . . an ex-felon," and that the prosecutor engaged in misconduct by neglecting to correct Berry's lie. The trial transcript of Berry's testimony reveals no questions about her criminal history. At the preliminary examination, Berry denied a more limited inquiry by defense counsel: "[H]ave you ever been convicted of a felony involving moral turpitude such as larceny or embezzlement, lying, anything like that?" Berry admitted that she currently was serving a term of probation. Although defendant maintains in his supplemental brief that "Berry had in fact served 60 months in prison for Criminal Sexual Conduct," defendant cites nothing in the trial court record substantiating his

[3] We acknowledge that "[i]dentification by photograph should not be used when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995) (citation and internal quotations omitted). Police may resort to a photographic lineup when the suspect is in custody only if a "legitimate reason" exists. *Kurylczyk*, 443 Mich at 298. The detective sergeant in charge of this case recalled that defendant had refused to participate in a live lineup, and the trial court record contains two forms, dated March 10, 2009, and March 11, 2009, signed by defendant attesting to his disinclination "to participate in a corporal [sic] line-up as requested." Defendant's refusals to participate in a corporeal lineup amount to a legitimate reason for holding a photographic lineup. *People v Davis*, 146 Mich App 537, 546; 381 NW2d 759 (1985).

assertion and does not otherwise identify any documentation tending to support this contention. Consequently, this claim of prosecutorial misconduct remains unfounded and essentially abandoned. See *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (observing that a defendant may not leave it to this Court to search for a factual basis to sustain his position).[4]

Defendant next complains that the prosecutor elicited "unchallenged and misleading information" from Berry at trial, including (1) her trial recollection of defendant's filet knife as brown, in contravention of prior testimony that the knife was red; (2) her testimony that defendant wore camouflage pants on the evening of March 7, 2009, when she earlier mentioned that defendant might have worn blue jeans; and (3) her testimony about the application for a personal protection order she had sought against defendant, into which she had allegedly inserted false or misleading information.[5] Defense counsel highlighted at trial, during cross-examination of Berry, that she had earlier "describe[d] [the filet knife] as having a brown handle," and that she had given varying accounts of the pants defendant wore on the evening of March 7, 2009. Defense counsel also questioned Berry at length concerning a misstatement in her personal protection order application against defendant—specifically that defendant was intoxicated on March 7, 2009, a detail about which Berry denied any recollection at trial, explaining that the personal protection order application contained information from "through the years that he was living in my home." Most importantly, however, our review of Berry's trial testimony confirms that it consisted of relevant information, MRE 401, and that the prosecutor in good faith elicited the relevant details that her testimony provided. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) ("prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence"). We perceive no misconduct requiring reversal in this regard.

Defendant also argues that the prosecutor "suppressed" two video recordings made by the sheriff's department, including "a video of the victim's home" and one of the scene where the victim's body was discovered. However, on June 6, 2011, defendant filed in this Court a handwritten letter and two appended items of correspondence indicating that defense counsel had received both videos from the prosecutor in December 2009. Further, as exhibit two to defendant's June 2011 filing in this Court, he attached a December 15, 2009, letter from defense counsel to the prosecutor requesting, in pertinent part, the following:

> I have been reviewing the voluminous documents that you provided to me and there are a couple of matters that I would like to straighten out.

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[4] Defendant also fails to identify any factual basis for his statements to the effect that the prosecutor withheld Berry's "criminal history . . . after defense's request," or that the prosecutor knew that information pertaining to Berry's prior conviction had surfaced in a recent "Macomb County Family Court" case that "involved . . . defendant's son."

[5] In another instance of an unsubstantiated argument regarding Berry, defendant criticizes her for having suggested that she went to sleep after he knocked on her door late on March 7, 2009, when "Berry was in fact awake and made a [sic] 84 minute call at 11:27 pm to a Flint, MI number." However, no verification of Berry's telephone call appears in the trial court record.

> 1. With respect to videos[,] the police reports indicated that there was a request that a video be taken of [the victim's] home; could you confirm whether or not that was done and if so, provide [me] with a copy.
>
> 2. Also, on the ME's report; it indicates . . . that a video was taken by the police where the body was found; if that video exists would you confirm it and provide me with a copy. . . .

On December 23, 2009, defense counsel corresponded with defendant in a letter reflecting that the prosecutor had turned over both videos:

> I also reviewed the video of the inside of [the victim's] house and unfortunately it does not show anything that we haven't seen before. I did carefully look at the tables and there were some little better pictures and I did not see a cell phone although there are objects that are not entirely clear.
>
> I will bring that video up along with the one that you requested of the crime scene.

Accordingly, contrary to defendant's argument on appeal, the prosecutor did not suppress the video recordings of the victim's house or the crime scene. We further emphasize that our review of the lengthy trial record in this case reflects the cumulative nature of video recordings of the victim's house and the location of the victim's body, given that abundant additional evidence was introduced concerning both scenes in the form of testimony, photographs, and physical evidence.

Turning to defendant's final two allegations of prosecutorial misconduct, he contends that "[i]n the prosecutor's closing argument, a comment was made to bolster the credibility of the government's evidence to infer it was overwhelming and credible. . . . 'I have 100 pieces of evidences [sic] on him!'" Several reviews of the prosecutor's closing and rebuttal arguments have left us unable to locate the precise quotation that defendant criticizes. But even assuming arguendo that the prosecutor did reference the existence of "100 pieces of evidence[]," he accurately described the record in this case. The transcripts confirm that the prosecutor offered more than 100 items of evidence into the record, and the detective sergeant in charge of the sheriff's department's investigation into the victim's death testified that "[i]n this case I believe we recovered close to 100 pieces of what we would consider evidence."[6]

Defendant lastly argues that the prosecutor improperly commented during closing argument that "[t]he defendant hasn't even denied that . . . the boots are his!" In defendant's estimation, this comment embodied an attack on his constitutional right not to testify at trial.

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[6] Moreover, we note that near the outset of defense counsel's closing argument, he observed, "For two weeks you've been sitting here, passively listening, taking notes. Now your job becomes active and you have to take all of this evidence, *I believe we're up over a hundred pieces of evidence . . . .*" (Emphasis added).

Presumably, defendant intended to reference a portion of the prosecutor's rebuttal argument, in which the prosecutor stated:

> [Defendant] didn't say he didn't own the boots, he didn't say he didn't own the jacket, he didn't say he didn't own the flare, he didn't say he didn't own the knife. Can you imagine? We found seven people with exact things that he owns and put them all in the same spot and said it's him. We just make it up. That's what we do in [the] Sheriff's Department, the prosecutor's office. We make it up.

The rebuttal argument by the prosecutor occurred after defense counsel had repeatedly accused the prosecutor, the police, and Berry of manufacturing the physical evidence against defendant. Even assuming that the prosecutor did improperly comment on defendant's constitutional exercise of his right against self-incrimination, "'an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.'" *Watson*, 245 Mich App at 593 (citation omitted). Reviewing the prosecutor's rebuttal comments in light of defense counsel's closing argument attack on the evidence against defendant, and given the trial court's instruction that the attorneys' arguments did not qualify as evidence and that the jury "must not consider the fact that [defendant] did not testify," we detect no plain impropriety that affected the outcome of defendant's trial.[7] *Unger*, 278 Mich App at 238; *Watson*, 245 Mich App at 592-593.

C. EVIDENTIARY ISSUES

Lastly in defendant's supplemental brief, he argues that the trial court improperly admitted several items of physical evidence without an adequate foundation, and allowed damaging hearsay into the record. Defendant also contends that he was wrongfully deprived of his constitutional right to appear at a September 28, 2009, suppression hearing.

Defendant did not object to the evidentiary foundation underlying the admissibility of two of the three items of evidence about which he now complains on appeal, a couch armrest cover retrieved from the victim's yard and a filet knife found in the vicinity of the victim's body. However, defendant did contest at trial the admissibility of a flare gun shell recovered from his house. This Court reviews for an abuse of discretion a trial court's decision whether a proponent of evidence has sufficiently authenticated the item for admission. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). But if the defendant has not preserved his challenges to the admissibility of evidence, this Court reviews the claims for plain error affecting the defendant's substantial rights. MRE 103(a)(1) and (d).

[7] We reject defendant's related claim that trial counsel was ineffective for failing to object to the prosecutor's rebuttal argument. Defendant cannot show that the failure to object likely affected the outcome of his trial. *Solmonson*, 261 Mich App at 663-664 (observing that a defendant "must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different").

"The rule governing the admission of . . . evidence requires that a proper foundation be laid and that the articles be identified as that which they purport to be and that the articles are shown to be connected with the crime or with the accused." *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). Testimony of a witness with knowledge "that a matter is what it is claimed to be" is one method of authentication or identification that conforms with MRE 901(a). MRE 901(b)(1).

Deputy Christopher Land testified that he participated in the execution of a search warrant at defendant's house at 20890 32-Mile Road on March 9, 2009. Land recounted that he photographed a couch armrest cover on one side of a couch in defendant's living room and took additional action in response to information he received from canine officer Deputy Clifton Morgan:

> *Land*: I had spoken to Deputy Morgan who is one of our canine officers and the information that I had been given is that there was an armchair sleeve exactly matching this one that had been located behind the residence directly across the street.
>
> *Prosecutor*: Did you go and collect that evidence?
>
> *Land*: Yes, sir, I did.
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> * * *
>
> *Prosecutor*: I'm going to hand you what is introduced as People's Exhibit Number 38 and ask if you would open and take the item out of there. Okay, and would you describe again for the record what that item is?
>
> *Land*: This is the armchair sleeve.
>
> *Prosecutor*: Now where did you pick that one up at?
>
> *Land*: Behind the deceased, the victim's residence.
>
> * * *
>
> *Land*: It had been outside over night. I remember that . . . it had been raining and so honestly I don't remember if it was wet, dry, but it was in the back yard, that's where it was located.

Land expressed that the couch armrest cover that he retrieved from the victim's property matched the armrest cover still on the couch in defendant's house. On cross-examination, Land acknowledged that the evidence tag for the couch armrest cover he had acquired from the victim's backyard incorrectly listed defendant's address as the place of recovery because "I messed up and put the wrong address in there." There was no plain error in admitting the couch armrest cover in light of Land's testimony identifying the armrest cover he obtained from the

victim's yard, and an accompanying photograph, which amply authenticated or identified the cover as "what it [wa]s claimed to be." MRE 901(b)(1).

With respect to the flare gun shell discovered in defendant's house, defendant seemingly disputes its admissibility on the ground that police reports reflect "two different officers claimed to have found the same evidence." Deputy Land described at trial his finding of a flare gun shell in the pocket of a blazer in a sitting room of defendant's residence, and Land identified at trial the flare shell he had recovered. However, defense counsel then elicited Land's agreement that Detective Sergeant David Willis had removed the flare shell from the packaging in which Land had placed it. When defense counsel objected to the insufficient chain of custody, the prosecutor advised the court that the chain of custody would be completed when Willis testified. Willis recalled that in December 2009 he compared the flare shell taken from defendant's house with another recovered underneath the victim's body; Willis confirmed that he took the flare from defendant's house out of its original paper packaging and placed the shell in plastic packaging bearing his signature. He identified at trial the flare shell in the packaging with his signature. We conclude that the trial court properly admitted the flare shell from defendant's house because the testimony of Land and Willis sufficiently authenticated or identified the shell as "what it [wa]s claimed to be." MRE 901(b)(1).

Concerning the filet knife, Deputy Jonathan Ramlow testified that on March 11, 2009, he participated in a search for evidence near the Orchard Trail, and that he was standing within "[t]wo to three feet" of another officer who that day came across the filet knife, picked it up, and immediately dropped it in its place, approximately 25 feet from the location of the victim's body. Deputy Land testified that he had photographed and collected the filet knife, and Land identified the filet knife at trial as the one he had collected. Defendant's abbreviated argument against the filet knife's admissibility asserts "[t]ampering and moving by police," because at the preliminary examination the "knife in photo was admitted showing knife to be placed under some weeds," whereas at trial "the same knife is admitted being on top of grass." However, deputies Ramlow and Land testified in a consistent fashion at both the preliminary examination and at trial regarding the filet knife's discovery. In light of Ramlow's and Land's testimony authenticating or identifying the filet knife, there was no plain error in admitting the filet knife into evidence.

Turning to defendant's argument that he was not allowed to appear at a suppression hearing of September 28, 2009, defendant did not make a timely constitutional objection to his failure to appear. Given that defendant has not preserved his constitutional argument in this regard, we limit our review to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant's constitutional "right to be present extends to every stage of the trial where an accused's substantial rights may be affected and where his presence relates to the fullness of his opportunity to defend the charge." *People v Ewing*, 48 Mich App 657, 659; 211 NW2d 56 (1973). The hearing of September 28, 2009, pertained to defendant's motion to suppress the flare shell taken from defendant's house. The motion urged that although the officers had obtained a warrant to search the house and although Berry had also given her consent to the search, the flare shell's discovery occurred before the search warrant arrived and Berry did not have authority to permit the officers to search defendant's personal areas. The prosecutor responded that "only after the search warrant was signed . . . that [a sergeant] notified

the officers at the house to begin their search. At no time was a search started, based only on the consent to search form." The prosecutor appended to his response copies of the search warrant signed by a judge at 3:20 p.m. on March 9, 2009, and a "return and tabulation" form prepared at 3:45 p.m. listing the items of property seized from defendant's house. At the September 2009 hearing, the trial court denied the motion to suppress because the documents submitted by the prosecutor established that the seizure of items from defendant's house took place after the officers had secured the warrant. We agree with defendant that the suppression hearing could have impacted his substantial rights, but we can fathom no way in which defendant's presence at the suppression hearing "relate[d] to the fullness of his opportunity to defend the charge." *Ewing*, 48 Mich App at 659. The trial court's suppression ruling depended entirely on the motion filings. Moreover, the parties do not dispute that defendant had been placed in a law enforcement vehicle at the time of the search, thus making it unlikely that he would possess information relevant to the motion to suppress. We perceive no error.

Defendant lastly argues that his audio-recorded statement injected inadmissible hearsay statements by members of his family. Accepting defendant's contention that the recording referred to a statement by his siblings that "the needle is too good for you,"[8] the prosecutor did not offer the statement to prove the truth of the matter asserted by defendant's siblings. Accordingly, the statement was not hearsay and did not affect defendant's right of confrontation. MRE 801(c); *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007) ("the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted"). Furthermore, the Confrontation Clauses of US Const, Am VI, and Const 1963, art 1, § 20, only prohibit the admissibility of "testimonial hearsay." "Statements are testimonial where the 'primary purpose' of the statements or the questions that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.'" *People v Lewis (On Remand)*, 287 Mich App 356, 359-360; 788 NW2d 461 (2010), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Nothing in the record suggests that any questioning prompted the out-of-court statement by defendant's siblings or that the statement was made to "'establish or prove past events potentially relevant to later criminal prosecution.'" *Lewis*, 287 Mich App at 360 (citation omitted).

V. CONCLUSION

We affirm defendant's convictions of, and sentences for, kidnapping, armed robbery, and burning of personal property valued between $1,000 and $20,000. We also affirm one of defendant's convictions of first-degree murder, together with defendant's corresponding life sentence. However, we must remand to the trial court for the limited, ministerial task of correcting defendant's judgment of sentence to reflect a single conviction and sentence of first-degree murder, supported by two different theories.

[8] The audio recording was not transcribed and the record does not contain a transcription or audio version of the recording.

Affirmed in part and remanded for correction of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen