STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2012
V	No. 298676 Wayne Circuit Court
CURTIS MARTEL JACKSON, Defendant-Appellant.	LC No. 09-029959 - FC

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 30 to 60 years for the second-degree murder conviction, one to five years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm.

Defendant argues on appeal that his Confrontation Clause rights were violated when a police officer testified that her investigation included a witness who did not actually see the shooting. We disagree.

Defendant has waived this issue on appeal. On direct examination, the prosecution did not ask the officer to reveal the contents of the witness's statement, and none of the officer's answers to the prosecutor's questions revealed the contents of the statement. It was defendant who first asked about the contents of the witness's statement, through a question on cross-examination about whether the witness said he saw the actual shooting. While defendant now objects that this evidence violated his Confrontation Clause rights, "[u]nder the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error." *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004), citing *People v Jones*, 468 Mich 345, 352; 662 NW2d 376 (2003). Since any alleged error resulted from defendant's own questions, defendant "has lost his right to assert this issue on appeal." *McPherson*, 263 Mich App at 139, citing *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Moreover, even if we were to review this claim, defendant's Confrontation Clause rights were not violated. To preserve this issue, defendant had to object at trial to this evidence and "specify the same ground for objection that is being asserted on appeal." *People v Aldrich*, 246

Mich App 101, 113; 631 NW2d 67 (2001); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). The objection at trial must be timely, which in the context of testimonial evidence means "interposed between the question and the answer." *Jones*, 468 Mich at 355. In this case, defendant did not object to the testimony on any grounds, so this issue is not preserved for appellate review. An unpreserved claim is reviewed only for plain error. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). An error must have occurred, the error must be plain (i.e., clear or obvious), and the plain error affected substantial rights. *Id.* at 763. An error affects substantial rights when it prejudiced the defendant, meaning it affected the outcome of the proceedings. *Id.*

Generally, a defendant has "the right to be confronted with the witnesses against him or her," and a witness's out of court testimonial statement will not be admitted against a defendant at trial. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). In this case, the witness's statement to the police officer was testimonial, as it was not given during an emergency, and the purpose of the statement was to prove past events relevant to the criminal proceeding. See *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Nevertheless, "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." *Chambers*, 277 Mich App at 10-11. In this case, since the contents of the witness's statement were not revealed on direct examination, defendant's cross-examination was not directed at disproving the truth of the witness's statement, since the jury had heard no evidence of the contents of such a statement. Instead, defendant was attempting to discredit the officer's testimony that the witness played any role in her investigation, since the witness did not actually see the shooting. Therefore, since the Confrontation Clause was not violated, there was no plain error requiring reversal.

Defendant next asserts that error occurred when various bad acts evidence was admitted into trial, which violated MRE 404(b) and was more prejudicial than probative. We disagree.

In order to preserve this issue for appeal, "[a] party opposing the admission of evidence must object at trial and specify the same ground for objection that is being asserted on appeal." *Aldrich*, 246 Mich App at 113; *Stimage*, 202 Mich App at 30. In this case, defendant never objected to any of this evidence based on MRE 404(b) or its prejudicial effect, so this issue is not preserved for review. An unpreserved claim is reviewed only for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764-765.

The alleged inadmissible evidence relates to defendant's conduct towards the only eyewitness to the shooting. Defendant was alleged to have verbally threatened the eyewitness regarding any attempt on her part to reveal her knowledge of the murder to the police. Also, there was evidence that the eyewitness was the victim of numerous crimes perpetuated by defendant or his friends, including arson, several assaults, unarmed robbery, and breaking and entering. Defendant asserts that this evidence was impermissible character evidence, as MRE 404(b)(1) states that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show conduct in conformity. *People v Katt*, 248 Mich App 282, 304-305; 639 NW2d 815 (2001). As is clear from the language of the rule, however, "relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.*, quoting *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993).

In this case, evidence of defendant's threatening statements and behavior was not admitted to show defendant's bad character, but was offered to illustrate that defendant was attempting to frighten the eyewitness into not reporting the victim's murder. In this case, the eyewitness delayed making any report of the crime for a significant period of time and that delay begged for explanation, "A defendant's threat against a witness is generally admissible [because] [i]t is conduct that can demonstrate consciousness of guilt." *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). Facts regarding a defendant's demeanor, nonresponsive conduct, and statements can be properly admitted as evidence of consciousness of guilt. *People v Solmonson*, 261 Mich App 657, 667; 683 NW2d 761 (2004), citing *People v McReavy*, 436 Mich 197, 213-214; 462 NW2d 1 (1990). The testimony of the eyewitness, and the testimony of police officers and a fire investigator responding to these crimes, was offered to prove that defendant was using threats and violence as a way of intimidating the eyewitness into not testifying, revealing defendant's consciousness of guilt. See *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Since defendant specifically threatened that his friends would burn down the eyewitness's house if defendant was in jail for the victim's murder, the behavior of third parties became relevant to defendant's threats and consciousness of guilt. Further, defendant fails to cite any case law stating that evidence of defendant's threats, admitted to prove defendant's consciousness of guilt, must also to comply with the requirements of MRE 404(b) evidence. Furthermore, this Court has held, in *Schaw*, 288 Mich App at 237, that evidence of defendant's threats "showed consciousness of guilt," with the specific basis for admissibility being "admissions under MRE 801(d)(2)."

Any prejudicial effect of this evidence did not outweigh its probative value. Relevant evidence is generally admissible, and "evidence that a defendant made efforts to influence an adverse witness is relevant if it shows consciousness of guilt." *Schaw*, 288 Mich App at 237, citing *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981); *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). In this case, evidence of defendant's threatening behavior was highly relevant, as it 'potentially demonstrated that the eyewitness had damaging information, and that defendant was attempting to force the eyewitness to remain silent. Moreover, evidence is only excluded if "its probative value is substantially outweighed by the danger of *unfair* prejudice…." MRE 403 (emphasis added). Evidence is considered "unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). In this case, not only was evidence of defendant's threatening statements and behavior highly probative of defendant's consciousness of guilt, it also did not amount to an overwhelming amount of evidence with explicit details that would cause a reasonable jury to give it preemptive weight. The prosecutor expressly stated in his closing arguments that the jury was not to convict defendant based on evidence of these other uncharged crimes. See *Schaw*, 288 Mich App at 238. Thus, there was no plain error in admitting this evidence, as any prejudicial effect did not substantially outweigh the probative value of this evidence.

Defendant next argues on appeal that the trial court's failure to sua sponte declare a mistrial when evidence that defendant committed two uncharged murders was admitted at trial. We disagree.

Defendant is the party who introduced the evidence of uncharged murders at trial. Rather than an unknowing solicitation of damaging testimony, defendant was purposely attempting to

use such evidence to discredit the only eyewitness, implying that despite her testimony, she was not scared of defendant because she reportedly knew defendant was a murderer for quite some time and remained in a relationship with him. Yet, in *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), this Court held that "[a] defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial." Thus, defendant cannot claim on appeal that this evidence, which he was purposely attempted to use to his advantage, denied him a fair trial. See *Knapp*, 244 Mich App at 378. The testimony subsequently elicited by the prosecutor regarding this issue was relevant and responsive to the testimony elicited by defendant," and likewise does not warrant reversal. *Knapp*, 244 Mich App at 378. Additionally, the trial court gave a limiting instruction regarding the evidence, informing the jury that it was not to take the evidence into consideration when deciding defendant's innocence or guilt in the current case. Since jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), there is no reason to assume that the jury gave improper weight to this evidence to the extent that it so prejudiced defendant as to deny him a fair trial.

Next, defendant asserts many instances of prosecutorial misconduct that defendant claims require reversal. We disagree.

To preserve a claim of prosecutorial misconduct, there must be a "contemporaneous objection or request for a curative instruction in regard to any alleged error." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). The objection must be based on the same grounds that defendant later raised on appeal. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996), citing *Stimage*, 202 Mich App at 30. In this case, defendant did not object to any alleged prosecutorial misconduct. Therefore, none of the claims of prosecutorial misconduct are preserved for appellate review. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *Ackerman*, 257 Mich App at 448. "The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice." *Brown*, 279 Mich App at 134.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Brown*, 279 Mich App at 134. "[I]n order for prosecutorial misconduct to constitute constitutional error, the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law." *People v Blackmon*, 280 Mich App 253, 269; 761 NW2d 172 (2008) (emphasis omitted). Defendant first argues that the prosecutor improperly introduced character evidence and deliberately circumvented the requirements of MRE 404(b). Yet, as discussed previously, evidence of defendant's threatening statements and behavior was properly admitted as threats against a witness, which demonstrated defendant's consciousness of guilt. See *Schaw*, 288 Mich App at 237. In this case, the prosecutor specifically stated that he was offering evidence of the arson of the eyewitness's home to show defendant's guilty state of mind, and presumably, the other evidence of defendant's threats was offered on similar grounds. Since there is nothing to suggest that the prosecutor was misleading the court or not using good faith in offering the evidence on these grounds, there was no plain error in the prosecutor's conduct regarding this evidence.

Defendant also claims that there were frequent instances of prosecutorial misconduct in the prosecutor's closing and rebuttal arguments. Generally, a prosecutor is "'accorded great latitude regarding their arguments and conduct'" during closing argument. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980), overruled on other grounds *People v Perry*, 460 Mich 55 (1999). A prosecutor's 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." *Brown*, 279 Mich App at 135-136.

Defendant first argues that the prosecutor used impermissible other bad acts evidence in his closing argument to bolster the eyewitness's testimony. While the prosecutor did reference defendant's threatening actions and statements directed at the eyewitness, this evidence was properly admitted at trial as evidence of defendant's consciousness of guilt. See *Schaw*, 288 Mich App at 237. Prosecutors can freely "'argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *Brown*, 279 Mich App at 135-136, quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). The prosecutor's use of facts in evidence to explain his theory of the case does not amount to an improper bolstering of the eyewitness's testimony.

Defendant's contention that the prosecutor improperly vouched for the eyewitness's credibility is also erroneous. "A prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness." *Thomas*, 260 Mich App at 455, citing *Bahoda*, 448 Mich at 276. However, the prosecutor, in stating that the eyewitness was the "most important witness," did not include any reference or implication that he had some special knowledge about the eyewitness's truthfulness, and was merely recognizing that she was the only testifying eyewitness to the shooting. Furthermore, while the prosecutor erred when he stated repeatedly that that he believed the eyewitness was not lying, "[t]he mere statement of the prosecutor's belief in the honesty of the complainant's testimony [does] not constitute error requiring reversal [when], as a whole, the remarks were fair." *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Also, a prosecutor may "comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Thomas*, 260 Mich App at 455.

Defendant next argues that the prosecutor improperly voiced a personal belief that the two defense witnesses were not credible. This claim is likewise without merit. While the prosecutor did state that he did not believe that the defense witnesses were being truthful in their testimony, "where the prosecutor's argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office, the words 'I believe' or 'I want you to convict' are not improper." *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). In this case, the prosecutor did not place his opinion in the context of defendant's guilt or innocence, and in no way encouraged jurors to suspend their powers of judgment. See *People v Truong*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Also, it is not as if the prosecution denigrated the defense witnesses. The prosecutor simply stated that he did not believe that their testimony was credible because of their relationship to defendant, one being his friend and the other his mother. No plain error existed in such comments.

Defendant's last argument regarding prosecutorial misconduct during the closing arguments is that the prosecutor mentioned facts not in evidence, namely, that the eyewitness testified to seeing the victim's body slump over and the victim's van move after the shooting. It is true that the eyewitness did not testify to seeing these events, and that a prosecutor "may not argue facts not in evidence or mischaracterize the evidence presented." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). The prosecutor's mention of facts not in evidence was a plain error.. Yet, as this is an unpreserved claim, defendant must illustrate that such error affected the outcome of the trial, which he is unable to do. Whether the eyewitness saw the victim's body slump over was not a critical fact in this case, as such a fact would seem to go towards proving that the victim was dead, which no one was disputing at trial. Moreover, whether the eyewitness saw the victim's van move also had little to do with the actual crime, namely, the killing of another person with the required intent. It cannot be said that but for these fairly irrelevant misstatements, the outcome of the trial would have been different or that a miscarriage of justice occurred. Lastly, and most importantly, the jury was instructed that anything the attorneys said was not evidence and could not be considered in its deliberations. Since a jury is presumed to follow jury instructions, *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000), there is nothing to suggest that the prosecutor's misstatements amounted to a miscarriage of justice.

Defendant also raises numerous instances of alleged ineffective assistance of counsel, which defendant claims denied him a fair trial. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must make a motion in the lower court for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Since there is nothing on the record indicating that either of these two motions occurred, this issue is not preserved for appellate review. Whether a defendant received effective assistance of counsel is a mixed question of fact and law. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002).

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, "the defendant must show that the deficient performance prejudiced the defense," which "requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687. The Court has held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

Defendant was not denied effective assistance of counsel when defense counsel deliberately elicited testimony of two uncharged murders. As previously discussed, this evidence was potentially helpful for defendant, as it tended to prove that the eyewitness was not a

credible witness. As stated above, the outcome of the trial was completely dependent on the jury's determinations regarding the credibility of the various witnesses. Defendant's attorney was attempting to render the prosecution's most important witness incredible. Moreover, "[d]ecisions concerning what evidence to present…are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 248 Mich App at 666. Additionally, because the limiting instruction is presumed to have been effective, it cannot be said that counsel's introduction of this evidence resulted in defendant's conviction.

Defendant was not denied effective assistance of counsel when defense counsel failed to request a jury instruction defining the term great bodily harm of second-degree murder. First, the trial court was under no obligation to define great bodily harm. As this Court explained in *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006), "when a word is not defined by statute, this Court presumes that the word is subject to ordinary comprehension," and a trial court's decision not to define that word for the jury does not constitute an error requiring reversal. The term great bodily harm is a phrase that the jury could define properly on its own, defendant is unable to illustrate that the failure to provide the definition had any effect on the verdict. Further, the defendant is unable to demonstrate that defense counsel acted objectively unreasonable. A defense counsel's decisions regarding jury instructions can be a matter of trial strategy. *People v Rice*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999); *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983). Thus, defense counsel may have made a strategic decision to avoid focusing the jury's attention on the harm aspect of the crime, as a way of emphasizing to the jury that regardless of what happened to Gaylin, defendant had nothing to do with the crime and instead had a complete alibi. Regardless of the exact nature of defense counsel's strategic thinking, "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Furthermore, defendant is unable to establish that but for this alleged error, the outcome of the trial would have been different.

Defendant was not denied effective assistance of counsel when defense counsel failed to request a curative or limiting instruction for evidence of the three uncharged crimes of unarmed robbery, arson, and breaking and entering. The evidence defendant refers to is that defendant assaulted the eyewitness and stole her phone, tried to climb through her window one morning, and that her house burned down after defendant threatened to burn it down. As previously discussed, this evidence of defendant's threats was properly admitted to show defendant's consciousness of guilt. See *Sholl*, 453 Mich at 740. Since this evidence was properly admitted, any request that an instruction be given informing the jury to entirely disregard this evidence would have been futile. Likewise, any request that an instruction be given informing the jury to only consider this evidence for a limited purpose also did not amount to ineffective assistance of counsel. The failure to request a particular jury instruction can be part of defense counsel strategy, *Matuszak*, 263 Mich App at 60, and a reviewing court will not substitute its judgment in matters of trial strategy, *Rockey*, 237 Mich App at 76-77; *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008). Not requesting a limiting instruction may very well have been a reasonable strategy to avoid focusing the jury's attention on evidence of defendant's threats and uncharged crimes. Moreover, even if defense counsel was objectively unreasonable in not requesting a limiting instruction, defendant is unable to show that such an error affected the

outcome of the trial. Defendant's conviction was certainly the product of the jury's conclusion that the prosecution's eyewitness was credible. Regardless of the testimony regarding defendant's alleged acts of intimidation, there was explicit testimony that defendant shot the victim multiple times at close range. Hence, defendant's conviction was the product of overwhelming evidence of guilt, as opposed to ineffective assistance of counsel.

Defendant was not denied effective assistance of counsel when defense counsel failed to call to the stand a witness who, allegedly, was present at the house that defendant and the eyewitness went to after the shooting. Defendant claims that this witness was in prison at the time the eyewitness testified to meeting the witness. However, "[a] failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009), citing *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Defendant provided no evidence in the lower court of what the witness would have testified to, whether the witness would testify in a way that helped defendant, or whether it was defense counsel's fault this witness did not testify. Moreover, even if defense counsel did behave objectively unreasonable in failing to call this witness to testify, it cannot be concluded that but for this error, the outcome of the trial would have been different. There was other testimony by the owner of the house that the witness was not present at the house. Consequently, the defense was able to argue its theory of the case and the jury was not completely deprived of the evidence in question.

Next, defendant' asserts that he was denied the effective assistance of counsel when his attorney failed to object to the admission of various pieces of evidence. 'In all of the following instances, any objection would have been futile, and this Court has repeatedly recognized that trial counsel is not obligated to raise futile objections, and counsel will not be deemed ineffective for failing to do so. *Matuszak*, 263 Mich App at 58; *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003); *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

First, defendant claims defense counsel should have objected to evidence that a police officer took the statement of a witness who did not actually see the shooting. Yet, as previously discussed, no evidence regarding the actual contents of the witness's statement was elicited through direct examination, so any objection would have been futile. Moreover, while on redirect examination, the prosecution did ask about the contents of the statement, such questions were properly confined to what was discussed on cross-examination, so any objection would have been futile.

Objections to defendant's threats and the prosecutor's comments during closing and rebuttal arguments would likewise have been futile. As previously discussed, evidence of defendant's threatening statements and behavior was properly admitted as evidence of defendant's consciousness of guilt. Likewise, the prosecutor's comments during closing, with one exception, were proper, so any objection would have been futile.

It is true, however, that the prosecutor improperly misrepresented that the eyewitness testified to seeing the victim's body slump over and the victim's van move. Trial counsel could have objected, but did not. The failure to object could have been a matter of trial strategy, with

the purpose of avoiding further scrutiny of the contents of the eyewitness's testimony, as she provided the most damaging evidence to defendant. Moreover, it cannot be concluded that but for defense counsel's failure to object to the prosecutor's improper comments, the outcome of the trial would have been different. The jury was instructed that the statements of the attorneys were not evidence, and as a jury is presumed to follow its instructions, *Mette*, 243 Mich App at 330-331, the probability that the jury based its verdict solely on these two improper comments is very low, particularly when considering the strength of the properly admitted testimony.

Defendant was also not denied effective assistance of counsel for his counsel's failure to insist that the deliberating jury be given a transcript of a requested portion of the eyewitness's testimony. It is first important to note that while defendant refers to this issue as one of waiver, that term presupposes that defendant had a right to have the transcript provided to the jury, which is an inaccurate statement of the law. A trial court is not required to provide a transcript of requested testimony to a deliberating jury, and rather, "[i]n response to a deliberating jury's request to have testimony reread, the rereading and extent of rereading are within the trial court's discretion." *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996), citing *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974).[1] Thus, a more accurate description of this alleged error is that defense counsel did not object to the trial court's decision to not provide a transcript.

Moreover, defense counsel's failure to object to the trial court's decision to not provide a transcript of the testimony to the jury may have been a strategic decision to avoid focusing the jury's attention on the eyewitness's testimony, as it was the most damaging testimony to defendant. . Also, the requested testimony was related to the identity of the parties present at the house that defendant and the eyewitness went to after the shooting. Even if the trial court permitted the jury to review this portion of the testimony, there is nothing to suggest that reviewing this relatively brief testimony about what happened after the murder would have so altered the jury's thinking that the outcome of the trial would have been different.

Defendant's final argument on appeal is that defense counsel's failure to request that great bodily harm be defined, failure to call a witness who was present immediately before the shooting to the stand, and failure to request a curative instruction for evidence of defendant's unarmed robbery, arson, and breaking and entering, amounted to cumulative error that denied defendant a fair trial. We disagree.

"This Court reviews a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003); See also *Dobek*, 274 Mich App at 106; *Knapp*, 244 Mich App at 387-388. So, "[t]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal." *Dobek*, 274 Mich App at 106. The errors to be considered must be of consequence, meaning that "the effect of the errors must

[1] MCR 6.414(J) reflects that it is within trial court's discretion whether to provide the jury with a transcript the requested testimony. Effective September 1, 2011, MCR 6.414(J) was amended by Michigan Court Order 0016, and became MCR 2.513(P). MCR 2.513(P) also states that it is within the trial court's discretion to provide a transcript of the requested testimony.

have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Knapp*, 244 Mich App at 388. "The cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Dobek*, 274 Mich App at 106.

Defendant argues that even if the individual effect of the separate instances of counsel's ineffective assistance cited above does not warrant reversal, the cumulative effect of such errors does. However, "only actual errors are aggregated to determine their cumulative effect." *Bahoda*, 448 Mich at 292 n 64. As previously discussed, in this case, there were no errors based on defense counsel's representation. Therefore, "absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Dobek*, 274 Mich App at 106; *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Moreover, even if this Court were to find that the defense counsel did err, the cumulative effect must be so great that it denies defendant a fair trial. *Dobek*, 274 Mich App at 107. In this case, defendant cannot establish that these alleged errors undermined the validity of the verdict. The definition of great bodily harm, evidence of the three uncharged crimes without a curative or limiting instruction, and the witness's statements were not at the core of the prosecution's case, and did not amount to such damaging evidence that the failure to in some way limit the impact seriously prejudiced defendant.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause