STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2013
v	No. 301485 Wayne Circuit Court
DARRYL COOPER, Defendant-Appellant.	LC No. 10-005526-FC

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant Darryl Cooper appeals by right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Cooper to serve life in prison without the possibility of parole for the murder conviction. It also sentenced him to serve one and one-half to five years in prison for the felon in possession of a firearm conviction and to two years in prison for the felony-firearm conviction. On appeal, Cooper argues that his convictions must be reversed on a variety of grounds. Because we conclude that there were no errors warranting relief, we affirm.

I. GREAT WEIGHT OF THE EVIDENCE

Cooper first argues that his convictions were contrary to the great weight of the evidence; specifically, he contends that the witness testimony identifying him as the person who shot Ronald Beard was flawed and incredible. Because Cooper did not move for a new trial on this basis before the trial court, we shall review this claim for plain error. *People v Cameron*, 291 Mich App 599, 617-618; 806 NW2d 371 (2011). "In order to warrant a new trial on the ground that a verdict is against the great weight of the evidence, the evidence presented at trial must preponderate so heavily against the verdict that 'it would be a miscarriage of justice to allow the verdict to stand.'" *People v Roper*, 286 Mich App 77, 89; 777 NW2d 483 (2009), quoting *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003).

Here, the prosecutor had the burden to prove that Cooper was the person who shot Beard. See *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976) (noting that identity is always an essential element in a criminal prosecution). The prosecutor could prove Cooper's identity through direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Three witnesses, Chalaunda Latham, Tenia Brim, and Shaunte Johnson,

testified about the events at issue. Shortly before the shooting, Beard was sitting in his car. Johnson drove up and stopped next to him so that Latham, who was sitting behind Johnson's seat, could talk to Beard through the windows. At some point, Johnson looked in her rearview mirror and saw Cooper running from his house with a long shotgun. Brim, who was in the front passenger seat, looked in the side mirror and also saw Cooper running up the street. Latham turned and saw Cooper running up the street with a long shotgun. As Johnson drove off, she saw Cooper bring the gun down and point it toward Beard's car. Johnson and Latham testified that they heard three gunshots, and Brim said she heard two gunshots. This testimony was sufficient to establish that Cooper was the person who shot Beard. *Id.*

Cooper argues that these witnesses' testimony must be disregarded because the testimony was not worthy of belief. Generally, the existence of conflicting evidence is insufficient to establish that a verdict is against the great weight of the evidence. *Roper*, 286 Mich App at 89. Unless "'it can be said that directly contradictory testimony was so far impeached that it "was deprived of all probative value or that the jury could not believe it," or contradicted indisputable facts or defied physical realities,'" courts must defer to the jury's resolution of the competing claims. *Id.* (citations omitted).

Cooper contends that Johnson's testimony was implausible because she claimed that he leveled the gun and put it in the driver's side window even though the medical examiner found no evidence of close-range firing. At trial, the medical examiner did testify that there was no evidence that Beard was shot at close range, but he also explained that an intermediate object such as clothing may filter out evidence of close-range firing. And there was testimony that Beard was wearing two layers of clothing. Thus, the evidence was not in fact contradictory.

Cooper similarly relies on the fact that no firearms, casings, or bullets were found at the murder scene, and that the weapons seized from his home were not consistent with the murder weapon. There was no dispute that Beard died from gunshot wounds on the day at issue and the fact that the murder weapon was not found did not preclude Cooper from being the shooter; indeed, there was testimony that he would have had plenty of time to dispose of the weapon and any shell casings. Therefore, this evidence—to the extent that it is contrary—does not warrant relief. *Id.*

Cooper finally argues that the witnesses were unworthy of belief because Latham had a motive to kill Beard and the other two witnesses were her friends. However, the jury heard the testimony concerning Latham's potential motive as well as their failure to immediately report the events to the police department. As such, the jury was in a position to judge these witnesses' credibility and we will not assess it anew on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

The verdict was not against the great weight of the evidence.

II. INSTRUCTIONAL ERROR

Cooper next argues that the trial court erred when it denied his request for a jury instruction on the lesser offense of voluntary manslaughter. In general, this Court reviews claims of instructional error de novo. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). However, we review a trial court's determination that a specific instruction is inapplicable to the facts of a case for an abuse of discretion. *Id*.

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). "A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). Voluntary manslaughter is a lesser included offense of first-degree murder. *Id.* at 540-541. Thus, Cooper would have been entitled to an instruction on voluntary manslaughter if a rational view of the evidence supported it. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005).

To prove voluntary manslaughter, the evidence must show that "(1) defendant killed in the heat of passion, (2) this passion was caused by adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *Roper*, 266 Mich App at 87, citing *People v Pouncey*, 437 Mich 382, 385; 471 NW2d 346 (1991). Here, there was evidence that Cooper had been involved in a verbal altercation with Beard some time before the shooting, but the evidence did not support the conclusion that the verbal disagreement constituted adequate provocation. See *Roper*, 286 Mich App at 89 (noting that not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter). And, even assuming that the confrontation constituted adequate provocation[1], the evidence reflects that sufficient time had passed during which a reasonable person could have controlled his passions.

Testimony established that, following the earlier confrontation in the field, Cooper ran off toward his house. Beard then drove away. Johnson picked up Latham and Brim and they drove around for 10 to 20 minutes. During this time, Latham tried calling Cooper several times, but he did not answer. Johnson then drove to Cooper's house, which was dark; Latham continued trying to call him, but he still did not answer. As they were about to leave, they saw Beard's car parked a couple houses away. Johnson drove up so Latham's backseat window was aligned with Beard's driver's side window, and Latham and Beard spoke. It was only after all these intervening events that Cooper came running up and shot Beard.

[1] Notably, Cooper's theory at trial was not that he acted in the heat of passion. Rather, his theory was that he was falsely implicated.

The evidence established that Cooper ran toward his home. He was then seen coming from the direction of his home and he now had a weapon that he did not earlier have. This evidence shows that he had the opportunity to retreat to safety and had time to gain control of his emotions. However, rather than stay in a place of safety, he decided to arm himself and then seek out and kill Beard. Because a rational view of the evidence did not support the requested voluntary manslaughter instruction, the trial court did not err when it refused to instruct the jury on that offense. *Tierney*, 266 Mich App at 714-715.

III. INEFFECTIVE ASSISTANCE

Cooper also argues on his own behalf that he was denied the effective assistance of counsel. Because there was no evidentiary hearing on these claims, our review is limited to mistakes that are apparent on the record. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), leave denied in relevant part, 493 Mich 864 (2012).

To establish that he did not receive the effective assistance of counsel, Cooper must show that his trial lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for his lawyer's errors, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). He must also overcome a strong presumption that his lawyer's acts or omissions fell within the wide range of reasonable professional assistance. *Gioglio*, 296 Mich App at 22.

Cooper contends that his lawyer was ineffective for failing to object to the admission of guns recovered from his home and Beard's bloody clothes on the ground that this evidence "prove[d] nothing[.]" Relevant evidence is generally admissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Here, the challenged evidence was relevant. The fact that Cooper had several long guns in his home tends to make it more likely than not that he had access to a long gun like the one he was seen carrying on the day at issue. The admission of Beard's clothing was also relevant; it helped to explain why there was no evidence from his autopsy that he was shot at close range. Because the evidence was relevant, Cooper's lawyer cannot be faulted for failing to object. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Cooper also argues that his lawyer was ineffective for failing to provide him with a complete discovery package; however, he failed to cite any authority for the proposition that his lawyer had a duty to do so, failed to meaningfully discuss the evidence concerning the discovery that his lawyer had, but refused to provide, and failed to meaningfully discuss how the failure to provide the discovery prejudiced his trial. Therefore, he has abandoned this claim of error on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Cooper next contends that he was denied effective assistance by his lawyer's failure to conduct a pretrial investigation or call certain character or alibi witnesses. In support of his contention, Cooper cites the preliminary examination transcript where his lawyer read a list of names of potential witnesses that he wanted sequestered. He argues that these witnesses were character or alibi witnesses that his lawyer failed to investigate and, if he had investigated them

and called them at trial, the witnesses' testimony would have proved his good character and that he was not at the scene. However, reviewing this claim on the record alone, there is no indication that Cooper's lawyer failed to investigate these witnesses or that any of the witnesses would have testified favorably to Cooper. We must presume that his lawyer acted within the range of reasonable professional assistance and, in doing so, we must "affirmatively entertain the range of possible reasons for the act or omission" to determine whether there "might have been a legitimate strategic reason for the act or omission." *Gioglio*, 296 Mich App at 22-23. Given the lack of evidence that Cooper's lawyer failed to investigate these witnesses or that they would have been able to testify to Cooper's benefit, we must presume that she did investigate these witnesses and determined that their testimony was unhelpful. *Id.* Cooper has not overcome the presumption that his lawyer provided effective assistance.

Finally, Cooper argues that he was denied the effective assistance of counsel because his lawyer was conducting a trial in another case at the same time. The existing record affords no basis to conclude that his lawyer's performance fell below an objective standard of reasonableness. She was present for all proceedings in this case. And it was only the final day of trial, at which closing arguments were made and jury instructions were given, that she participated in another trial; even so, the trial court in this case started promptly at 9:00 a.m. to accommodate defense counsel, counsel made her closing argument and attended all of the proceedings, and she was then excused for the other trial while the jury deliberated. There is no indication that her performance was affected in any manner by the other trial. Further, the record does not suggest a reasonable probability that the outcome of the proceedings would have been different but for this scheduling conflict. Although the reading of the verdict was delayed for approximately two hours after the jury reached a verdict, the jury was never informed that defense counsel had another trial or that this was the cause for the delay in reading the verdict. Accordingly, because Cooper has not established either deficient performance or prejudice, his ineffective assistance of counsel claim fails. *Uphaus*, 278 Mich App at 185.

IV. SUFFICIENCY OF THE EVIDENCE

Cooper also argues, in a rambling brief submitted on his own behalf, that there was insufficient evidence to support his convictions. Specifically, he summarizes evidence—particularly the eye witnesses' testimony—that he believes was incredible and concludes that his convictions must be reversed as a result.[2] We will not second guess the jury's resolution of credibility disputes. *Davis*, 241 Mich App at 700. And, when the witness testimony is combined with the other evidence, there was sufficient evidence to support each conviction. As already discussed under his challenge premised on the great weight of the evidence, it was undisputed that someone shot and killed Beard on the day at issue. There was also direct testimony to establish that Cooper was the one who shot and killed Beard and that he did so after returning to

[2] He also asserts various other errors in passing, such as criticisms of his trial lawyer's conduct of the case, the public defense system, and the prosecutor. To the extent that we have not addressed those claims of error in this opinion, it is because we have concluded that Cooper has abandoned them on appeal by failing to meaningfully address them. See *Martin*, 271 Mich App at 315.

his home, retrieving a weapon, and then returning to find Beard some 20 minutes or more after having an altercation with him. In addition, the parties stipulated that Cooper was ineligible to possess a firearm. When viewed in the light most favorable to the prosecution, this evidence was sufficient to permit a rational trier of fact to find each element of the charged offenses had been proved beyond a reasonable doubt. *Roper*, 286 Mich App at 83. Consequently, there was sufficient evidence to support Cooper's convictions.

V. THE SEARCH WARRANT AND ARREST

Cooper next argues that the search of his home was illegal because the warrant was issued without probable cause. Because this issue was not raised and addressed by the trial court, we shall review it for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Because there is a strong preference for searches conducted under the authority of a search warrant, courts will strongly defer to a magistrate's decision that there is probable cause to issue a warrant. *Martin*, 271 Mich App at 297. As such, this Court's review is limited to determining whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause. *Id.* There is probable cause sufficient to support the issuance of a search warrant when there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* at 298.

Here, the record does not contain the search warrant affidavit and there is, therefore, no basis in the existing record to conclude that probable cause for a search warrant was lacking. The record reflects that the police officers obtained a search warrant after Latham, Brim, and Johnson provided statements four days after the murder. Given that Latham, Brim, and Johnson identified Cooper as the shooter and stated that he ran up to Beard after first running to his house some minutes earlier, a reasonably cautious person could have concluded that there was a fair probability that evidence of a crime would be found at his house. For these reasons, we cannot conclude that the trial court plainly erred by not sua sponte suppressing the warrant. *Carines*, 460 Mich at 763-764.

For similar reasons, we must reject Cooper's suggestion that his arrest was likewise unlawful. In his brief, Cooper implies that the officers improperly arrested him after he returned to his house following the search. The existing record affords no basis to conclude that the police lacked probable cause to arrest him. "A custodial arrest is permitted if an arresting officer possesses enough information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v MacLeod*, 254 Mich App 222, 227-228; 656 NW2d 844 (2002); MCL 764.15(1)(c). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). After the witnesses identified Cooper as the person who shot Beard, the officers had probable cause to arrest him for murder. In addition, after the officers recovered firearms from Cooper's home with knowledge that he was a felon, they had probable cause to arrest him for being a felon-in-possession. Therefore, there was no plain error. *Carines*, 460 Mich at 763-764. And, because his arrest was lawful, we must also reject Cooper's claims that his lawyer was ineffective for failing to investigate and move for dismissal for unlawful arrest. *Ericksen*, 288 Mich App at 201.

VI. FELON-IN-POSSESSION

Cooper next argues that he could not be convicted of being a felon-in-possession because his right to possess firearms had been restored. At trial, Cooper's lawyer stipulated that Cooper had been convicted of a felony, was ineligible to possess a firearm, and that his right to do so had not been restored. Therefore, this issue is waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Eisen*, 296 Mich App 326, 328-329; 820 NW2d 229 (2012). There is also no support in the record for Cooper's assertion that his right to possess a firearm had been restored. Because there is no record evidence that his rights had been restored, Cooper cannot establish that his trial lawyer's decision to stipulate to his ineligibility fell below an objective standard of reasonableness under prevailing professional norms. *Uphaus*, 278 Mich App at 185.

VII. PROSECUTORIAL MISCONDUCT

Next, Cooper argues that the prosecutor committed misconduct by improperly referring to Cooper's prior bad acts. Because Cooper's trial lawyer did not object to the prosecutor's remarks, we shall review this claim for plain error. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). This Court reviews a claim of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *Id.*

Cooper asserts that the prosecutor improperly referred to prior bad acts, but he does not cite any particular remark or otherwise discuss the allegedly improperly comments. Therefore, he has abandoned this claim of error. *Martin*, 271 Mich App at 315. In any event, our review of the record has revealed no indication that the prosecutor improperly referred to any prior bad acts.

He also argues that the prosecutor committed misconduct during closing argument by referring to a fact that was not in evidence; namely, that Cooper was in his house watching Latham talk to Beard. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Here, Cooper faults the prosecutor for stating that Cooper was likely at home watching Latham and Beard:

> Now, notice that the lights are off when the ladies arrive. Well, it's easier to see what's going on outside your house when the lights are off. And you know he's sitting there watching [Latham] talking to Ronald Beard again. And imagine how disrespected he's feeling now because [Latham] is on his street, at his house, talking to her other boyfriend again.

The prosecutor's statement was supported by a reasonable inference from the evidence. Testimony established that Cooper had been seen running toward his house following the earlier confrontation and that the house was dark when the women arrived outside. The testimony also established that he had earlier stated that he felt disrespected by Beard's actions toward Latham and that it was shortly after Latham stopped to talk with Beard that Cooper came running from his house with a long gun that he did not have in the earlier confrontation. The prosecutor could

reasonably argue that this evidence supported the conclusion that Cooper was in the house and watching Latham and Beard. *Ackerman*, 257 Mich App at 450.

Cooper contends that the prosecutor committed further misconduct by improperly asking the jury to draw an adverse inference from his silence. It appears that he is referring to the portion of the prosecutor's closing argument in which the prosecutor addressed and played a portion of Cooper's recorded jail phone conversation with his other girlfriend, Tawana McGee. The prosecutor noted that during the conversation, Cooper was "saying, 'Um-hum, yeah, yeah,' and he's laughing. So everything he says—she says, he's adopting, he's agreeing with, he's acknowledging." The prosecutor indicated that during the recorded conversation, Cooper and McGee were laughing about how Latham and her friends were going to be treated in the community, and that McGee at one point referred to Latham as a "rat-a-tat-tat." Then, after playing the excerpt of the recording for the jury, the prosecutor stated, "So what's a rat? A rat is somebody who tells on one of their own. Not one time do you hear any of them call her a liar."

The record thus reflects that the prosecutor was not asking the jury to draw an adverse inference from Cooper's silence. Rather, the prosecutor merely commented on the implication of calling Latham a "rat" rather than a "liar." That is, the prosecutor was suggesting to the jury a reasonable inference to be drawn from the choice of the word used to describe Latham. The prosecutor did not make an improper reference to silence or otherwise exceed the bounds of permissible argument.

But even if any of the prosecutor's comments were improper, Cooper has failed to establish that a timely curative instruction could not have alleviated any prejudice. *Bennett*, 290 Mich App at 476. There was no prosecutorial misconduct warranting relief.

VIII. TRANSCRIPTS

Cooper next argues that the trial court abused its discretion in responding to the jury's request for transcripts. A trial court's decision regarding whether and to what extent to allow a deliberating jury to review testimony is reviewed for an abuse of discretion. MCR 2.513(P)[3]; *Carter*, 462 Mich at 218. Because Cooper failed to preserve this issue below, we review for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

"A defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court." *Carter*, 462 Mich at 218. The trial court may order the jury to resume deliberations without the requested review, but the court should not foreclose the possibility of later reviewing the requested testimony by other means, such as by having the court reporter read back the testimony. *Id*. at 213 n 10; MCR 2.513(P). See also *People v Holmes*, 482 Mich 1105; 758 NW2d 262 (2008); *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996). Here, the trial

[3] This court rule was amended in 2011 to reflect the Michigan Supreme Court's reforms for jury trials. See MCR 2.514, 2011 staff comment. At the time of this trial, a similar provision was contained under MCR 6.414(J) (repealed).

court did not foreclose the possibility of the jury reviewing the testimony of the three eyewitnesses. The jury requested the transcripts less than one hour after it began deliberating. The court indicated it would take over three hours to reread the testimony to the jury and instructed the jury to resume deliberation and attempt to reconstruct the testimony as a group if it could. The court informed the jury that the court reporter would in the meantime prepare the transcripts of the requested testimony, which would take at least a day. Because the trial court expressly told the jury that the transcripts would be prepared while the jury resumed deliberation, the court did not foreclose review of the testimony. Thus, the court did not abuse its discretion in responding to the jury's request.

Moreover, Cooper has not established that defense counsel was ineffective for failing to object to the court's response to the jury's request. Cooper's trial lawyer may well have determined that this response was the most practical or may have thought it best for the jury to rely on its collective memories. Therefore, Cooper has not overcome the presumption that his trial lawyer provided effective assistance. *Gioglio*, 296 Mich App at 22-23.

IX. INSTRUCTIONAL ERROR

Finally, we shall address Cooper's argument that the trial court erred in failing to instruct the jury on the reliability of identification testimony. This issue is waived because defense counsel expressed satisfaction with the jury instructions by stating that she had no objections. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). In any event, the record reflects that the trial court instructed the jury at length regarding the consideration of identification testimony. Cooper's argument is therefore unavailing and his ineffective assistance of counsel argument on this matter also fails given that he has not established the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Kelly