STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2013
v	No. 302023 Macomb Circuit Court
SHANNON JAMEL ANDERSON, Defendant-Appellant.	LC No. 2007-002162-FC

Before: SAWYER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury-based convictions of assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, second-degree murder, MCL 750.317, and felon in possession of a firearm, MCL 750.224f. We affirm.

Defendant's convictions stem from a January 2007 shooting near defendant's hair salon in Eastpointe, Michigan. Stanley Rhynes died in the shooting, and Troy Christian was injured. In September 2007, defendant stood trial on charges arising from the shooting and was convicted. However, the trial court granted defendant a new trial on the ground that defendant's trial counsel was ineffective. This Court affirmed the grant of a new trial. *People v Anderson*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2009 (Docket No. 290688).

Defendant stood trial again in 2010 and was again convicted. On appeal from these convictions, defendant first argues that the trial court erred by allowing the prosecution to introduce a prior consistent statement of Troy Christian. This Court reviews "preserved evidentiary issues for an abuse of discretion." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* "A preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (internal citations omitted).

MRE 801(d)(1)(B) provides that a prior statement of a witness is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

To be admissible under MRE 801(d)(1)(B), four elements must be satisfied:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*Mahone*, 294 Mich App at 213-214, quoting *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).]

The prior statement at issue in this case is the statement Christian made on February 12, 2007, in an interview with police officers at the Macomb County Jail. The prosecution solicited this statement in its redirect examination of Christian. Defendant argues that the prosecutor failed to establish that the statement met Rule 801(d)(1)(B)'s second and fourth elements: recent fabrication and lack of prior motive to falsify.

Defendant's argument fails for two reasons. First, defendant contended during the trial that Christian had a motive to lie and testify against defendant for several different reasons, including to avoid criminal liability *and* to secure a plea deal. In opening statement, defendant's counsel stated:

> You'll hear that he [Christian] testified and that he testified regarding why he's testifying here because he got a deal. What a deal. He got a deal to be able to plead to conspiracy to whatever – sell mar [sic] – buy marijuana, a marijuana conspiracy with a recommendation of probation, which he got from assault with intent to murder and felony-firearm.

Thus, defendant's counsel implied that Christian was testifying only because he received a good plea deal, which is "an implied charge of recent fabrication or improper influence or motive." See *Mahone*, 294 Mich App at 213-214. In addition, defendant questioned Christian about this issue on cross-examination:

> *Q.* Have you testified in the past that the reason you are testifying against Mr. Anderson is because of the deal that you got?
>
> *A.* No.

Defendant then impeached Christian with testimony he gave on April 13, 2007, in which Christian said that he was testifying against defendant because it would lessen his charges.

Second, Christian made the prior consistent statement before the alleged motive to fabricate arose. See *Mahone*, 294 Mich App at 213-214. When Christian made the statement to

police on February 12, 2007, at the Macomb County Jail, he had not yet been offered a specific plea agreement.[1]

Defendant next contends that the trial court abused its discretion in holding that defendant could not impeach Christian's trial testimony with the digitized recordings from his police interviews on January 17, 2007, and February 12, 2007. We disagree.

Preserved evidentiary issues are reviewed for an abuse of discretion. *Mahone*, 294 Mich App at 212. When constitutional issues are preserved, this Court must determine if the error was harmless beyond a reasonable doubt. *People v Dendel*, 289 Mich App 445, 475; 797 NW2d 645 (2010). An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id*. If this Court determines that the jury would have convicted defendant even without the error, the defendant is not entitled to a new trial. See *id.* at 476.

Defendant argues that the use of the recordings violated his confrontation rights and his right to present a defense. We review de novo a defendant's claim that he was denied his right of confrontation under the Sixth Amendment. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012). We also review de novo a defendant's claim that he was denied his constitutional right to present a defense. *People v Unger (On Remand)*, 278 Mich App 210, 247; 749 NW2d 272 (2008).

Under the Confrontation Clause, a defendant has the right "to be confronted with the witnesses against him." US Const, Am VI; see also Const 1963, art 1, § 20. This right allows a defendant to cross-examine and challenge the witness's credibility, such as by showing that "a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v Ritchie*, 480 US 39, 51-52; 107 S Ct 989; 94 L Ed 2d 40 (1987). Under MRE 613(b), extrinsic evidence of a witness's prior inconsistent statement is admissible if the witness is "afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon." However, a trial court judge can impose reasonable limits on cross-examination to address concerns of "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986); see also MRE 611(a); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). In addition, it is within the trial court's discretion to preclude impeachment of a witness on a collateral matter. *People v Wofford*, 196 Mich App 275, 281; 492 NW2d 747 (1992).

The trial court was within its discretion in concluding that the digitized images of Christian's demeanor during his police interviews were not admissible. Christian admitted that

[1] Defendant further contends that the statement Christian made on February 12, 2007, was not admissible under the excited utterance hearsay exception, MRE 803(2). The prosecution did not argue, and the trial court did not rule, that the statement in question was admissible under MRE 803(2). As discussed above, the statement was admissible as a prior consistent statement under MRE 801(d)(1)(B), so we need not decide whether it was also admissible as an excited utterance.

the majority of his January 17, 2007, statement to police was false. Defendant argues that he should have been allowed to play the portion of the January 17, 2007, interview where Christian is writing on a diagram of the hair salon and showing where he, defendant, and Rhynes were positioned in the salon. When defendant tried to question Christian about the diagram, Christian claimed he did not remember drawing on it. Defendant asserts that this line of questioning was important because Christian's writing on the diagram indicates that defendant was standing between Christian and Rhynes, which corroborates defendant's testimony that he was ambushed. Defendant avers that the diagram is contrary to Christian's testimony that defendant was facing him and Rhynes, who were standing next to each other and against the wall. However, Christian admitted that it looked like his signature on the diagram. Thus, defense counsel was able to effectively impeach Christian on this issue, and the trial court did not abuse its discretion in precluding cumulative evidence.

Similarly, defendant effectively impeached Christian regarding his trial testimony that Rhynes may have taken Christian's gun from his center console when Rhynes was looking for some change as they were in the drive-through at a fast food restaurant. Defense counsel impeached Christian with a receipt from the restaurant found in Christian's car, which showed that cash was paid for the order and coins were received in change.

Finally, defendant claims that the recordings could have been used to refresh Christian's allegedly selective memory lapses. However, defense counsel had transcripts from the interviews that he could have used to refresh Christian's memory.

Defendant next argues on appeal that the trial court abused its discretion in denying his motion for a mistrial. This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a mistrial. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). An abuse of discretion occurs when the trial court chooses "an outcome that is outside the range of principled outcomes." *Id*. Whether a defendant's right against self-incrimination was infringed upon is a question of constitutional law that we review de novo. See *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

"A trial court should grant a mistrial 'only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *Schaw*, 288 Mich App at 236, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Generally, if an individual invokes his right to remain silent after being arrested and given *Miranda* warnings, that silence cannot be used against him.[2] *Shafier*, 483 Mich at 212; see also *Wainwright v Greenfield*, 474 US 284, 290-291; 106 S Ct 634; 88 L Ed 2d 623 (1986); *Doyle v Ohio*, 426 US 610, 616-620; 96 S Ct 2240; 49 L Ed 2d 91 (1976). "[P]rosecutorial references to a defendant's post-arrest, post-*Miranda* silence violate a defendant's due process rights under the Fourteenth Amendment of the United States Constitution." *Shafier*, 483 Mich at 212-213. This silence cannot be used as substantive evidence or for impeachment. *Id.* at 214.

[2] Defendant does not argue that the police failed to give him the *Miranda* warnings. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Accordingly, we analyze this issue as challenge to post-*Miranda* silence.

Defendant asserts that a comment made by Detective James Baker violated his Fifth Amendment right against self-incrimination. We disagree and conclude the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Defendant's argument is based on Detective Baker's comment: "I would have loved to have gotten an initial statement from Mr. Anderson also." Defendant asserts that this comment referred to defendant's post-arrest, post-*Miranda* silence.

Assuming that Detective Baker's comment did address defendant's post-arrest silence, the comment did not require a mistrial. The comment "was so minimal that 'silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference.'" *Shafier*, 483 Mich at 218, quoting *Greer v Miller*, 483 US 756, 764-765; 107 S Ct 3102; 97 L Ed 2d 618 (1987). In *Greer*, 483 US at 764, the United States Supreme Court held that there was no violation of the defendant's due process rights:

> [T]he trial court in this case did not permit the inquiry that *Doyle* forbids. Instead, the court explicitly sustained an objection to the only question that touched upon Miller's postarrest silence. No further questioning or argument with respect to Miller's silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained. Unlike the prosecutor in *Doyle*, the prosecutor in this case was not allowed to undertake impeachment on, or permitted to call attention to, Miller's silence. [Internal footnotes, quotation marks, and citations omitted.]

The situation in this case was similar. Detective Baker's statement was the only one that touched on defendant's silence. Outside the presence of the jury, defendant moved for a mistrial, which the trial court denied. However, the court instructed the jury immediately upon its return that "defendant has an absolute right not to testify during this trial and not to answer questions, a right not to answer questions during the investigative phase as well, and to not have those facts used against him." The court also told the jury to disregard Detective Baker's comment about wanting to get a statement from defendant and explained to the jury that the comment was not responsive to defense counsel's question. The prosecution did not attempt to impeach defendant with his silence after arrest.

Thus, the reference to defendant's post-arrest silence in the instant case was far different than the references in *Shafier*, 483 Mich at 217-219, in which a due process violation was found. In *Shafier*, the prosecution repeatedly used defendant's silence as evidence of his guilt. *Shafier*, 483 Mich at 218. The prosecution made these references in its opening statement, examination of the arresting police officer, cross-examination of the defendant, and closing argument. *Id*. That situation is far different from the instant one, where a witness made one isolated comment that indirectly referenced a defendant's silence.

Defendant also argues that the prosecutor infringed on his right against self-incrimination when he cross-examined defendant and noted that defendant had the chance to hear the other witnesses testify and read the police reports before he testified. Defendant contends that this questioning improperly implied that defendant lied or changed his testimony to fit with the evidence already presented. The United States Supreme Court expressly rejected this argument in *Portuondo v Agard*, 529 US 61, 65-73; 120 S Ct 1119; 146 L Ed 2d 47 (2000). In *Portuondo*,

the prosecution argued in its closing that the defendant had the opportunity to listen to the testimony of the other witnesses and change his testimony accordingly. *Portuondo*, 529 US at 64. The United States Supreme Court held that these comments were appropriate because they "concerned respondent's *credibility as a witness*, and were therefore in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" *Portuondo*, 529 US at 69, quoting *Brown v United States*, 356 US 148, 154; 78 S Ct 622; 2 L Ed 2d 589 (1958) (emphasis in original). The Court further stated:

> A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth. [*Portuondo*, 529 US at 73.]

Therefore, the prosecution's comments did not violate defendant's constitutional rights, and the trial court was within its discretion to deny defendant's motion for a mistrial.

Defendant next argues that the trial court abused its discretion in admitting photographs from the autopsy of Rhynes. We disagree. "A decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009).

Defendant argues that the photographs were irrelevant and substantially more prejudicial than probative. One of the photographs showed all of the gunshot wounds other than the wound on the back of the head. Dr. Daniel Spitz, who conducted the autopsy, described the wounds shown in the photograph:

> This was the wound that involved the outer surface of the left arm, traversed the arm through the skin and soft tissue, exited the inner surface of the arm, which you don't actually see the exit wound, and then re-entered the chest.
>
> * * *
>
> This was a wound that, again, I, I described as in, involving the outer surface of the left arm. This was an entrance wound, it, it traversed the skin, soft tissue, and muscle, and exited the left front surface of the chest. And this was a gunshot wound to the left side of the face, in, in the area that I call the left cheek . . . it involved skin and soft tissue, when it, it exited through the mouth, but caused injury along the way, including fractures of the face, facial bones, fractures of multiple teeth, and a graze wound across the tongue before it actually exited the body.

The other challenged photograph also showed several of the wounds on Rhynes's body. The photograph showed the entrance wound on Rhynes's face, the exit wound on Rhynes's chest, the exit wound on Rhynes's inner left arm, and the reentry wound on Rhynes's chest.

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403. Photographs may be used to corroborate a witness' testimony, and gruesomeness alone need not cause exclusion." *Gayheart*, 285 Mich App at 227.

Photographs may properly be used to corroborate other evidence and are not excludable simply because they are cumulative of a witness's oral testimony. The jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself. [*Id.* (internal quotation marks and citations omitted).]

First, the autopsy photographs at issue were relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The photographs were relevant to prove defendant's intent; the nature and extent of a victim's injuries can be evidence of intent. See *Gayheart*, 285 Mich App at 227; *Unger*, 278 Mich App at 257. Malice is an element of second-degree murder; it is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). In addition, the photographs were relevant because they corroborated Dr. Spitz's testimony regarding Rhynes's injuries and cause of death. Photographs may be used to corroborate witness testimony, even if cumulative of that testimony. *Gayheart*, 285 Mich App at 227.

Second, the probative value of the autopsy photographs was not "substantially outweighed by the danger of unfair prejudice." See MRE 403. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). However, "prejudice that stems only from the abhorrent nature of the crime itself" is not unfair prejudice. *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). The autopsy photographs at issue were probative to show the nature and extent of Rhynes's injuries. They also showed the trajectories of the bullet wounds, which were indicative of which way Rhynes was facing when he was shot and whether defendant was, in fact, acting in self-defense. This evidence was not unfairly prejudicial. Although the prosecution sought to introduce nine photographs from Rhynes's autopsy, the trial court excluded all but the two photographs at issue. "The jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself." *Gayheart*, 285 Mich App at 227. In addition, "Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony by the trial judge." *Blackston*, 481 Mich at 462 (internal citation omitted).

Defendant also contends that prosecutorial misconduct denied him a fair trial. We disagree.

To preserve a claim of prosecutorial misconduct, a defendant must "timely and specifically object[], except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant points to three examples of alleged prosecutorial misconduct. In two of these examples, defense counsel did not object. In the third example,

defense counsel objected but he did not *specifically* object that the argument improperly bolstered Christian's credibility. In fact, defendant did not state any legal grounds for his objection. Therefore, this issue is unpreserved.

An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *Unger*, 278 Mich App at 235. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal citation omitted). An error does not require reversal "where a curative instruction could have alleviated any prejudicial effect." *Unger*, 278 Mich App at 235.

A claim of prosecutorial misconduct only warrants a new trial when the defendant "was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). The defendant has the burden of showing that any error "resulted in a miscarriage of justice." *Id*. The prosecutor's statements are reviewed as a whole and in context with the evidence presented and the defendant's arguments. *Brown*, 279 Mich App at 135. Prosecutors are generally "accorded great latitude regarding their arguments and conduct at trial." *Unger*, 278 Mich App at 236. It is improper for a prosecutor to misstate the law or facts; however, "proper jury instructions cure most errors because jurors are presumed to follow the trial judge's instructions." See *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

First, defendant contends that the prosecutor improperly argued facts not in evidence when he said that Rhynes was shot while on the ground. This argument lacks merit. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but [he] 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). The prosecutor specifically said:

> Again, at some point the defendant had shot Stanley Rhynes as he laid [sic] on the ground. You can see from this blood splatter which is right by the floor right here. At some point he was shot while he was on the ground. Blood on the floor, blood on the floor corroborates Troy Christian's account.

This argument was not improper; the prosecutor made a reasonable inference from the evidence. See *Ackerman*, 257 Mich App at 450. The evidence showed that Rhynes was shot four times. The shot that entered Rhynes's arm, exited, and then went through his chest without exiting was shot from less than eight inches away. It was reasonable for the prosecutor to infer that Rhynes did not remain standing while he was shot four times—including once in his face and once in the back of his head. In addition, three of the bullets were fired from more than eight inches away, while the fourth was fired from within eight inches. This evidence supports the inference that defendant was approaching Rhynes while shooting him—perhaps because Rhynes was lying on the ground and not moving. Furthermore, the trial court instructed the jury that the attorneys' statements are not evidence.

Second, defendant asserts that the prosecutor impermissibly bolstered Christian's testimony by asking him a series of leading questions on redirect examination. MRE 611(d)(1)

states that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." We agree that the prosecution asked Christian leading questions during part of the redirect examination. For example, the prosecutor asked Christian, "[d]id you not tell the detectives that you were shot from behind" and "[d]id you not tell the detectives that . . . after you had gone outside, you actually shot the Cadillac window out?" However, a violation of this rule only warrants reversal when "some prejudice or pattern of eliciting inadmissible testimony" is shown. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

First, the information elicited by the prosecutor during the questioning at issue was admissible. As discussed above, Christian's statement to police on February 12, 2007, was admissible as a prior consistent statement pursuant to MRE 801(d)(1)(B). Second, reversal is not required because an objection and instruction could have cured the error. See *Unger*, 278 Mich App at 235. For example, if defense counsel had objected, then the prosecutor could have rephrased his questions to be more open-ended.

Finally, defendant claims that the prosecutor improperly vouched for Christian's credibility when he made the following statements during his closing argument:

> [Christian's] been very forthcoming ever since the Macomb County jail statement which was on February 12th.
>
> * * *
>
> The February 12th, 2007 jail interview. I think that interview is extremely important because there was no promises made [sic]. . . . The truth is that only his statement made any sense.

It is improper for the prosecutor to vouch for the credibility of his witnesses "'to the effect that he has some special knowledge concerning a witness' truthfulness.'" *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010), quoting *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The comments cited by defendant do not indicate that the prosecutor had some special knowledge concerning Christian's truthfulness. The prosecutor discussed Christian's admittedly false statements to police before the February 12, 2007, interview and asserted that since that interview, Christian's statements have been consistent. The fact that Christian previously lied to police but was relatively consistent in his story since the February 12, 2007, interview, was not "special knowledge" of the prosecutor. Christian was questioned at length about his previous statements in front of the jury. In addition, "[a] prosecutor may fairly respond to an issue raised by the defendant." *Brown*, 279 Mich App at 135. The prosecutor was responding to defendant's assertion throughout the trial that Christian was not a credible witness. The prosecutor did not improperly vouch for Christian's credibility.

Defendant also argues that he was denied the effective assistance of trial counsel. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing in the trial court. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant did not

move for a new trial or a *Ginther* hearing with the trial court. Therefore, this issue is unpreserved.

"Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), citing *People v Grant*, 470 Mich 477, 481; 684 NW2d 686 (2004). This Court reviews the trial court's findings of fact for clear error and questions of constitutional law de novo. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); see also MCR 2.613(C). When a claim of ineffective assistance of counsel is unpreserved, "review is limited to mistakes apparent on the record." *Rodriguez*, 251 Mich App at 38.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," and, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010) (internal citations omitted); see also *People v Buie (On Second Remand)*, 298 Mich App 50, 62; 825 NW2d 361 (2012). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel is not ineffective for failing to make a meritless argument or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant first contends that his trial counsel should have objected to Christian's prior consistent statements because they were made after a motive to fabricate arose. However, defense counsel did object on this ground. For example, defense counsel argued:

> There is no indication of recent fabrication. *There was fabrication from the beginning. It wasn't recent.* [Emphasis added.]

This objection demonstrates defense counsel's argument that Christian was lying, and had a motive to lie, from the moment the crime occurred—to avoid criminal liability for his involvement. Defendant asserted that Christian's motive to fabricate arose at virtually the same time that the crime occurred, so all of Christian's statements were made after the motive arose.

Secondly, defendant claims that his trial counsel was ineffective for failing to object to the instances of alleged prosecutorial misconduct that he raises on appeal. As discussed above, most of the examples cited by defendant did not constitute prosecutorial misconduct. Counsel is not ineffective for failing to make a meritless argument or raise a futile objection. *Ericksen*, 288 Mich App at 201. With respect to defense counsel's failure to object when the prosecutor asked Christian a series of leading questions, that error was not outcome determinative. If defense counsel had objected, then the prosecutor would have been able to rephrase his questions to solicit the same information. The objection would not have changed the evidence presented to the jury.

Finally, defendant contends that the cumulative effect of the errors he raises on appeal entitle him to a new trial. We disagree.

"We review this issue to determine if the combination of alleged errors denied defendant a fair trial." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

"The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but 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. If the defendant has not established any errors, then reversal is not warranted. *Id*.

As discussed above, defendant's allegations of error lack merit. "Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Dobek*, 274 Mich App at 106. Therefore, defendant is not entitled to a new trial.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly