STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 27, 2012
V SCHUYLER DION CHENAULT, Defendant-Appellee.	No. 309384 Oakland Circuit Court LC No. 2008-222726-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V SCHUYLER DION CHENAULT, Defendant-Appellant.	No. 310456 Oakland Circuit Court LC No. 2008-222726-FC

Before: FORT HOOD, P. J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In Docket No. 309384, the prosecution appeals by leave granted the trial court's order granting defendant's motion for a new trial premised on a *Brady*[1] violation involving the prosecution's failure to turn over recordings of police interviews of witnesses. In Docket No. 310456, defendant appeals by delayed leave granted the same order to the extent that it denied his motion for a new trial based on ineffective assistance of counsel and prosecutorial misconduct. Because the prosecution's failure to turn over the recorded interviews did not violate *Brady*, defendant was not denied the effective assistance of counsel, and the prosecution did not commit misconduct, we affirm in part and reverse in part.

[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Defendant's convictions arise out of the shooting death of Keith Harris in Pontiac on June 29, 2008. Defendant had arranged to purchase cocaine from Harris and shot Harris in the head as Harris was attempting to deliver the cocaine. Jared Chambers, a friend of Harris and an acquaintance of defendant, arranged the deal and was present during the shooting. Defendant arrived at the scene in a vehicle driven by Joshua Koch and was also accompanied by Keith McBee-Blevins, Chambers, and Koch's girlfriend, Erica Upshaw. Heather Holloway, Harris's girlfriend, was sitting in the passenger seat of a vehicle driven by Harris. She observed defendant and Chambers get out of their vehicle and walk in front of Harris's car. Chambers got into the backseat of Harris's car behind Holloway and defendant opened the rear passenger door on the driver's side and shot Harris in the head. Defendant's theory of defense at trial was that Chambers, rather than defendant, shot Harris and fled with the cocaine and money to be used to purchase the drugs. A jury convicted defendant of open murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b.

After trial, the trial court granted defendant's motion for a new trial on the basis that the prosecution violated its duty, set forth in *Brady*, to disclose exculpatory evidence to the defense. The evidence consisted of several recordings of police interviews of witnesses. The trial court denied defendant's motion to the extent that defendant claimed that he was entitled to a new trial based on ineffective assistance of counsel and prosecutorial misconduct. Both the prosecution and defendant appeal the trial court's rulings.

I. *BRADY* VIOLATION

In Docket No. 309384, the prosecution argues that the trial court abused its discretion by granting defendant a new trial because the recordings of the police interviews did not benefit defendant and called into question his theory of defense. We review for an abuse of discretion a trial court's decision whether to grant a new trial. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). "An abuse of discretion occurs when the result is outside the range of principled outcomes." *Id*. We review de novo the trial court's determination whether a *Brady* violation occurred. *United States v Holder*, 657 F3d 322, 328 (CA 6, 2011).

"Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v Cain*, ___ US ___; 132 S Ct 627, 630; 181 L Ed 2d 571 (2012). "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985). "Such evidence is 'evidence favorable to an accused,'" "that, if disclosed and used effectively, . . . may make the difference between conviction and acquittal." *Id*., quoting *Brady*, 373 US at 87.

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the

> outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267, 276 (1998).][2]

The fourth requirement is the materiality requirement. See *Bagley*, 473 US at 682 ("evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.") A reasonable probability of a different result, however, does not mean that the defendant would not have been convicted if the evidence had not been suppressed.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." [*Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555; 131 L Ed 2d 490 (1995).]

Further, the materiality of suppressed evidence is to be determined collectively rather than item by item. *Id*. at 436.

The prosecution argues that the trial court abused its discretion by granting defendant a new trial, on the basis of *Brady*, when the recordings were not favorable to defendant, they could have been obtained with reasonable diligence, and the failure to turn over the recordings did not undermine confidence in the outcome of the trial. We first address whether defendant could have obtained the recordings with reasonable diligence.

On the third and final day of trial, Detective Steven Wittebort testified that all the witness interviews were recorded and that defense counsel should have copies of the recordings. During his cross-examination, Wittebort testified as follows:

> *A.* All of our interviews are recorded, they are all [sic] videos and it is in the oral, it is in the recorded video of the interview that we conducted.

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[2] Defendant contends that the test set forth in *Lester* contains an additional element not present in the traditional *Brady* test, namely that the defendant did not possess the evidence and could not have obtained it with reasonable diligence. Because this Court decided *Lester* after November 1, 1990, and that case has not been reversed or modified by our Supreme Court or by a special panel of this Court, MCR 7.215(J)(1) requires us to follow the rule of law articulated in *Lester*. In any event, the challenged element is consistent with the notion that the rule of *Brady* applies when information is discovered after trial that "had been known to the prosecution but unknown to the defense." *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976). See also *United States v Clark*, 928 F2d 733, 738 (CA 6, 1991), quoting *United States v Grossman*, 843 F2d 78, 85 (CA 2, 1988) ("No *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information[.]'")

Q. Do you have it with you?

A. You guys should have it.

Q. Never seen it.

A. Should have.

Q. Okay.

A. I thought --- it was all recorded.

Q. Okay. I don't have it. No offense to you.

Therefore, defense counsel was aware that the witness interviews were recorded, but he made no effort to obtain the recordings. If counsel wanted to review the recordings for potential exculpatory evidence, he should have requested an adjournment or continuance in order to do so. Defendant contends that MCR 6.201(H), regarding the continuing duty to disclose information, required the prosecution to produce the recordings when Wittebort admitted their existence during trial and that, because the prosecution failed to do so, there was no basis to request a continuance. Defendant's argument misses the mark. Regardless of the prosecution's failure to turn over the evidence, defense counsel was obligated to investigate the matter and request a continuance if he wanted to examine the recordings. "[W]hen a defendant realizes that exculpatory evidence has been withheld, the 'appropriate course' is to seek a continuance if 'more time to investigate the exculpatory potential of the evidence' is needed." *United States v Kimoto*, 588 F3d 464, 488 (CA 7, 2009), quoting *United States v Grintjes*, 237 F3d 876, 880 (CA 7, 2001). Otherwise, a defendant may harbor error as an appellate parachute by failing to explore the issue in the trial court, thereby depriving the court of an opportunity to correct a possible error. See *People v Vaughn*, 491 Mich 642, 674; 821 NW2d 288 (2012).

In addition, defendant's aunt, Audrey Rice, testified at the evidentiary hearing on defendant's motion for a new trial that Wittebort presented a copy of a DVD, purportedly containing the recorded interviews, to defense counsel after the jury began its deliberations on the last day of trial. According to Rice, Wittebort told counsel that the DVD was a master copy and that he would be able to provide counsel with a copy of the DVD within one week. Rice testified that she was furious that counsel did not take the DVD, stating "we've been looking for it, the other attorneys have not been able to locate it." Rice's testimony tends to show that if counsel has requested a continuance to review the recorded interviews, they would have been made available. Accordingly, the record establishes that defendant could have obtained the recordings with reasonable diligence.

In addition, the recorded interviews were either not favorable to defendant or their suppression did not undermine confidence in the outcome of the trial, or both. Defendant contends that in both interviews of Holloway, Harris's girlfriend, the police promised her that she would not be charged with a drug offense if she cooperated. Defendant asserts that because the police did not include anything about the promise in their written reports and Holloway made no mention of the promise in her written statements, defense counsel was unaware of the promise, which he could have used to impeach Holloway's trial testimony. "It is well

established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under *Brady*." *Bell v Bell*, 512 F3d 223, 233 (CA 6, 2008). Moreover, "[t]he existence of a less formal, unwritten or tacit agreement is also subject to *Brady*'s disclosure mandate." *Id*. "Yet, the mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit *agreement*." *Akrawi v Booker*, 572 F3d 252, 263 (CA 6, 2009) (emphasis in original).

Defendant's assertion that the police promised Holloway during her first interview that she would not be charged with a drug offense mischaracterizes the record. Toward the end of the interview, the police asked Holloway whether Harris was known to carry a lot of money on him. Holloway responded that Harris was "broke right now." At that point, Wittebort stated, "I aint [sic] say right now. You know what I'm talking about. It's time, you just got to be straight up. We're not narcotics police we don't care, [sic] we don't give a f___ about drugs." Wittebort did not promise Holloway anything, and his statement that the police did not care about drugs was made in an effort to convince Holloway to tell the truth about what had occurred. It is undisputed that Holloway was not truthful during her first interview and that she maintained that two men had approached Harris's vehicle and one of the men shot Harris in the head while she and Harris were talking. Holloway was attempting to protect Harris, who was still alive at that point, and did not mention anything about the drug deal. Defense counsel was aware that Holloway lied during her first statement and questioned her about the matter during trial.

During her second interview, after Harris had died, Holloway told the police that the shooting occurred during an attempted drug deal. She admitted that Harris was going to meet people to sell them cocaine. She told the police the entire story, including that Harris "was dealing with some guy named Jarred [sic, Chambers]," and that Chambers had approached Harris's vehicle with defendant and sat down in the backseat behind the passenger seat. Holloway also stated that when defendant shot Harris, Chambers got out of the car and ran away. After Holloway told the police what had occurred, she indicated that her mother was upset with her. Wittebort suggested that Holloway was "doing stuff" for Harris, but Holloway stated, "I didn't do stuff for him." Wittebort then stated that Holloway's mother was angry because Holloway did not tell the police the truth during her first interview. He maintained, "That's why you guys was [sic] afraid every time we come to the house, thought we were gonna arrest you. That's not, that's not what we wanna do." Wittebort's statement was not a promise that Holloway would not be charged with a drug offense, and, in any event, Wittebort made the statement after Holloway acknowledged that she been untruthful during her first interview and fully explained the events that had transpired.

After Holloway provided a written statement during her second interview, Wittebort again advised her that the police did not care about the drugs. Wittebort stated, "Here's the fear I want you to get over, we, are not the drug police, we don't do narcotics at all. . . . I know what you're afraid of you're afraid you're gonna catch a dope case." Holloway responded, "I know I can't I wasn't selling no dope." Again, Wittebort did not make the statement until after Holloway fully explained the events that had occurred and provided a written statement. Further, the record evidences that there was no mutual understanding or agreement that Holloway would not be charged, particularly considering that Holloway did not think that she could be charged with a drug offense. See *Akrawi*, 572 F3d at 263. Accordingly, the record belies defendant's

assertion that Holloway's recorded interviews had significant impeachment value because the police promised her that she would not be charged with a drug offense.

Defendant also argues that he could have used Holloway's recorded statements to impeach her identification of defendant at trial. Defendant contends that Holloway's description of the shooter during her first interview matched that of Chambers. Defendant also asserts that Holloway's identification of defendant in a photographic lineup during her second interview was the result of the suggestive nature of the identification procedure because the police officer who showed Holloway the lineup had his finger on defendant's photo. We first note that defendant's latter contention is simply untrue. A review of the recording shows that the police officer had his hand on the second photograph in the array as he slid the array across the table to Holloway. Defendant's picture was the first photograph in the array. In addition, contrary to defendant's argument that Holloway had difficulty identifying defendant, the recording shows that Holloway looked at the photographs for a few seconds and then repeatedly tapped defendant's photograph with her finger, saying "[t]his guy right here. This is him right here." She then drew multiple circles around defendant's photo. Thereafter, she asked if the person she had selected was light-skinned, if his named was "Skyler," and if Chambers had selected the same person, but she also stated, "I know that's him." Thus, the recording does not support defendant's argument that Holloway had difficulty selecting the shooter's photo or that her identification of defendant was weak.

Moreover, in both of her recorded interviews, Holloway's description of the shooter was consistent. She repeatedly described the shooter as somewhat tall with a light complexion, thin face, high cheekbones, and facial hair around his mouth. Defendant argues that Holloway's description of the shooter matched Chambers's description and that defense counsel could have used the recorded interviews to impeach Holloway's identification of defendant. Holloway's description of the shooter was in the police "supplement report," however, and was therefore available to defense counsel at the time of trial. Notably, Holloway's description was consistent with defendant's features, and Chambers testified that defendant was skinnier at the time of the shooting than he was at the time of trial. Given Holloway's strong identification of defendant when she saw his photograph during her second interview, defendant's argument that her recorded interviews could have been used to impeach her identification is untenable.

Further, contrary to defendant's theory that Holloway implicated defendant because she was scared of Chambers, she stated during her second interview that she believed that Chambers was involved in the plan to shoot Harris. Thus, the recorded interview contravened defendant's theory of the case. In addition, it is undisputed that Holloway did not mention Chambers during her first interview or in her first written statement. Defense counsel cross-examined Holloway regarding that omission, which was consistent with defendant's theory that Holloway implicated defendant rather than Chambers because she was scared of Chambers. Defense counsel also cross-examined Holloway regarding whether she talked to Melvin Wooten, a friend of Harris's, at the police station. Defendant argues that Wooten was "functioning as an unofficial investigator for the police" and received a phone call from Chambers claiming that defendant was the person who shot Harris. According to defendant, Wooten then spread the word that defendant was the shooter, and Holloway repeated that version of events. Because the police "supplement report" indicated that both Holloway and Wooten were present in the same area of the police station before their interviews and that they were listening to a telephone conversation

on speaker phone, that information was available to defense counsel before trial, and he cross-examined Holloway regarding the information.

Defendant also argues that the recorded interview of Chambers shows that the police offered Chambers immunity from prosecution in exchange for his statement and testimony against defendant. Defendant contends that defense counsel could have impeached Chambers's trial testimony if the recorded interview had been turned over and counsel had been aware of the deal. Initially, we note that a review of the recorded interview shows that Chambers was not offered anything in exchange for his testimony. In fact, no mention was ever made of Chambers testifying against anyone. Moreover, although the police told Chambers that they were not the "dope police," they did not care about narcotics, and that the only person who was going to get into trouble was the person who shot and killed Harris, they did not offer Chambers immunity in exchange for his implication of defendant. Rather, the police told Chambers that they needed to know everyone who was present during the shooting and that everyone needed to be truthful. They did not suggest that Chambers should implicate defendant in any way. Thereafter, Chambers stated, "I'll start from the very beginning," and explained that defendant had contacted him to purchase cocaine and that he then contacted Harris to set up the cocaine deal.

Toward the end of Chambers's interview, the police asked him to write a statement, which he was reluctant to do. One of the police officers then told Chambers:

> Let me tell you something, this is being video taped right now, okay? So they can hear me, you are not being charged with shit, you understand that? I'm not charging you, I'm gonna take you home as soon as we. [sic] If you don't want to write it that's fine.

Chambers did not provide a written statement and the interview ended shortly thereafter. Although the officer's statement may be properly considered a promise not to charge Chambers, it has little impeachment value given that Chambers did not provide a written statement and had already told the police his version of the incident implicating defendant when the officer made the promise. Thus, contrary to defendant's argument, Chambers's recorded interview had little impeachment value.

Finally, the suppressed recorded interviews, considered collectively, were not material because their suppression did not undermine confidence in the outcome of the trial. See *Kyles*, 514 US at 434, 436. Holloway, Chambers, and McBee-Blevins all testified that defendant shot Harris in the head while Harris was attempting to deliver cocaine to defendant. All three stories were consistent that defendant was the shooter. The trial testimony was also consistent with Chambers's recorded interview and with Holloway's second recorded interview. None of the suppressed interviews supported defendant's theory that Chambers shot Harris. Thus, considering the evidence admitted during trial and the substance of the recorded interviews, we cannot conclude that the suppressed interviews could reasonably "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 US at 435. Accordingly, the trial court erred by concluding that a *Brady* violation occurred and abused its discretion by granting defendant a new trial on the basis of the alleged violation. We therefore reverse the trial court's order to the extent that it granted defendant a new trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In Docket No. 310456, defendant argues that the trial court erred by denying his motion for a new trial and his request for a *Ginther*[3] hearing on the basis of ineffective assistance of counsel. We review for an abuse of discretion a trial court's decision whether to grant a new trial. *Brown*, 279 Mich App at 144. We review de novo whether a defendant was denied his constitutional right to the effective assistance of counsel. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

"Both the United States and Michigan constitutions provide that the accused shall have the right to counsel for his defense." *People v Aceval (On Remand)*, 282 Mich App 379, 386; 764 NW2d 285 (2009). The constitutional right to counsel includes the right to the effective assistance of counsel. *Id*. "To establish ineffective assistance of counsel, [a] defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463 Mich at 600.

Defendant first argues that counsel rendered ineffective assistance by failing to object when defendant stood trial on the charge of open murder when he had not been bound over on that charge. At the conclusion of the preliminary examination, defendant was bound over on the charges of felony murder and felony-firearm, and the initial information charged defendant with those offenses. Defendant's attorney at that time was Anthony Chambers. At a December 17, 2009, pretrial conference, the prosecution indicated its intent to file an amended information charging defendant with open murder, and Chambers did not object to amending the murder charge from felony murder to open murder. On December 18, 2009, the prosecution filed a third amended information charging defendant with open murder and felony-firearm. In an affidavit submitted after trial, Chambers averred that he agreed to the amendment only for the purpose of plea negotiations and that he did not intend for defendant to stand trial on the open murder charge. After the amendment, Alvin Keel substituted for Chambers as defendant's trial counsel and no plea was ever reached.

Defendant contends that Keel should have objected to defendant proceeding to trial on the open murder charge because defendant had not been bound over on that charge and his chance of being convicted of an offense that carried a life sentence doubled given that an open murder charge allowed him to be convicted under either a felony murder or premeditated murder theory. MCR 6.112(H) provides that a trial court may "before, during, or after trial" "permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or

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

prejudice the defendant." Further, "[a] trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008); see also MCL 767.76.

In this case, the amendment did not involve a new or different crime, defendant was fully aware of the nature of the charges against him, and the amendment did not affect defendant's defense that he was not the shooter. Moreover, the open murder charge fully comported with the evidence presented at the preliminary examination, which supported both a felony murder and a premeditated murder theory, and the amendment was made months before trial. Thus, because an objection to defendant proceeding to trial on the open murder charge would not have been successful, Keel did not render ineffective assistance of counsel by failing to object. See *People v Petri*, 279 Mich App 407, 415; 760 NW2d 882 (2008) ("Counsel need not make a futile objection.")

In conjunction with his claim of error regarding the amended information, defendant asserts that he was denied his right to "conflict-free" counsel. Defendant contends that the amended information was the product of his representation by Chambers, with whom he had a conflict, and that the amended information should not have survived Chamber's representation. Because defendant has failed to fully explain or cite pertinent authority for his position, he has abandoned appellate review of this claim of error. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, defendant's reliance on *Cuyler v Sullivan*, 446 US 335; 100 S Ct 1708; 64 L Ed 2d 333 (1980), as support for his position is misplaced. That case involved a possible conflict of interest stemming from the defense attorneys' representation of multiple defendants. *Id*. at 345. Because defendant has failed to elaborate his argument or cite appropriate authority for his position, he has abandoned this claim of error.

Defendant next contends that Keel rendered ineffective assistance of counsel by failing to request that the trial court instruct the jury on "mere presence," defendant's theory of defense. A trial court must instruct the jury on the applicable law, the issues presented, and, if a party requests, that party's theory of the case. *People v Anstey*, 476 Mich 436, 451-452; 719 NW2d 579 (2006). "Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). "[T]he failure to give a requested instruction is error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *People v Moldenhauer*, 210 Mich App 158, 159–160; 533 NW2d 9 (1995). When a defendant requests a jury instruction on a defense that is supported by the evidence, the trial court must give it. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Moreover, an attorney's failure to request a particular instruction may be a matter of trial strategy. See *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003).

CJI2d 8.5, the jury instruction on "mere presence," provides:

> Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it.

The language of the instruction indicates that it applies when the defendant knows that a crime was planned or was being committed and the prosecution proceeds on an aiding and abetting theory. Here, the prosecution did not proceed on an aiding and abetting theory, and defendant testified that he did not know that Chambers had a gun or that he intended to shoot Harris. Thus, the jury instruction was not applicable. "Trial counsel's failure to request an instruction inapplicable to the facts at bar does not constitute ineffective assistance of counsel." *People v Truong*, 218 Mich App 325, 341; 553 NW2d 692 (1996). In addition, considering that the instruction was inapplicable, defendant has not overcome the presumption that counsel's failure to request the instruction constituted sound trial strategy. See *Gonzalez*, 468 Mich at 645; *Carbin*, 463 Mich at 600. In any event, the trial court's instructions fairly presented the issues and sufficiently protected defendant's rights because they informed the jury of the presumption of innocence, the necessity of demonstrating defendant's guilt beyond a reasonable doubt, and the necessity of finding that defendant acted affirmatively in order to convict. "Had the jury accepted defendant's version of his participation, or lack thereof, as urged by defense counsel, it would not have convicted defendant under the instructions given." *Moldenhauer*, 210 Mich App at 161. "Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights." *Id.* at 159.

Defendant next argues that Keel rendered ineffective assistance of counsel by failing to object to the trial court instructing the jury in accordance with CJI2d 4.1, regarding defendant's out-of-court statements. Defendant asserts that the instruction was given based on the prosecution's theory that the instruction applies to res gestae statements but the particular statements at issue were never identified. Defendant argues that the instruction was erroneous because it pertains only to statements that a defendant made to law enforcement personnel and he did not make any statement to the police. In accordance with CJI2d 4.1, the trial court instructed the jury as follows:

> The Prosecution has introduced evidence of a statement that it claims the Defendant made.
>
> Before you may consider such an out-of-court [statement] against the Defendant you must first find that the Defendant actually made the statement as given to you.
>
> If you find that the Defendant did make the statement, you may give the statement whatever weight you think it deserves.
>
> In deciding this you should think about how and when the statement was made and about all the other evidence in the case.
>
> You may consider the statement in deciding the fact[s] of this case.

Defendant waived appellate review of this issue by initially objecting to the instruction, but then agreeing that the instruction was appropriate. Defendant's waiver extinguished any

error. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Only after defendant waived appellate review of the purported error, did he assert that the instruction was not appropriate. In any event, defendant has offered no argument, and has therefore failed to establish, that there exists a reasonable probability of a different result but for the alleged error. See *Uphaus*, 278 Mich App at 185. Thus, defendant is entitled to no relief.

Defendant next argues that Keel rendered ineffective assistance of counsel by failing to timely object to juror Nicholas George remaining on the jury after George discovered that he had gone to the same high school as defendant. Because defense counsel stated that he would "leave it to the Court's discretion" whether to excuse the juror, defendant waived appellate review of this issue.

During voir dire, George stated that in 2007 he graduated from Farmington High School, the same high school that defendant, Koch, and Upshaw had attended. When asked whether the Farmington Hills connection would influence him, George responded, "[p]ossibly." George also indicated that his father was in the FBI and that he had a "whole lot of family in law enforcement" and "just a general bias." Keel further questioned George regarding those issues during voir dire. Ultimately, George indicated that he was able to be fair, and the jury, which included George, was impaneled.

At the beginning of the third and final day of trial, George sent the trial court a note stating that he now recognized defendant from attending high school with him. When the trial court questioned George outside the presence of the other jurors, George stated that he did not initially recognize defendant because defendant's appearance had changed significantly in the years since high school. George indicated that he had had one class together with defendant, that he was not friends with defendant in high school, and that he had had friends who were friends with defendant. George was not aware of any problems between defendant and his friends and had not formed an opinion about defendant based on his interactions with those mutual friends. George indicated that he could continue "to be fair and impartial and to give everybody, both sides, a fair shake and fair trial[.]" After George returned to the jury room, the prosecutor indicated that he was not asking for George to be excused because George had not expressed any bias or prejudice. Keel responded, "[m]y client cannot recognize him. So we would leave it to the Court's discretion at this point. Okay. He cannot recognize him." The trial court then stated that the record did not provide any basis for excusing George and indicated that it would deal with the issue at the close of proofs. Later that day, immediately after the trial court selected the jurors that would serve as alternates, Keel indicated that defendant wanted George removed from the jury because of the potential for bias given that defendant "ran in a different group than George" in high school. The trial court denied the request, stating that defendant had waived the issue and that George had attested that he could be fair and impartial.

As the trial court properly determined, defendant waived appellate review of this issue by leaving it to the trial court's discretion whether to remove George after George had indicated that he recognized defendant from high school. Waiver is the intentional relinquishment or abandonment of a known right." *Carter*, 462 Mich at 215 (quotation marks and citations omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.* (quotation marks and citations omitted). Accordingly, defendant waived appellate review of his challenge

to George remaining on the jury. In any event, Keel did not render ineffective assistance of counsel by failing to timely object to George remaining on the jury as discussed below.

An attorney's decisions regarding matters relating to jury selection generally fall within the realm of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). This Court has recognized that a reviewing court cannot see the jurors, listen to their answers to questions, or witness their facial expressions or manner of answering questions. *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). Defendant has failed to overcome the strong presumption that Keel's initial failure to object to George remaining on the jury was a matter of sound trial strategy. Further, defendant has failed to establish a reasonable probability of a different result if Keel had timely objected. See *Uphaus*, 278 Mich App at 185. The record shows that George expressed his ability to be fair and impartial, and nothing indicates that George harbored a secret bias against defendant. Therefore, defendant has failed to substantiate his claim of error.

Defendant next contends that Keel rendered ineffective assistance of counsel by failing to obtain the recorded witness interviews after he knew of their existence and by failing to challenge Holloway's in-court and out-of-court identifications of defendant. As previously discussed in Issue I, once Wittebort testified that the interviews of the witnesses were recorded, Keel should have sought a continuance if he wanted to investigate the potential exculpatory nature of the recordings. See *Kimoto*, 588 F3d at 488. Keel's failure to do so, however, did not constitute ineffective assistance of counsel because, as discussed previously, the prosecution's failure to turn over the recordings did not undermine confidence in the outcome of the trial. *Kyles*, 514 US at 434, 436. Defendant has therefore failed to establish that there exists a reasonable probability of a different result if Keel had sought a continuance and obtained the recordings. *Uphaus*, 278 Mich App at 185.

Finally, because the existing record is sufficient to review defendant's claims of ineffective assistance of counsel, the trial court did not err by denying defendant's motion for a *Ginther* hearing. See *People v Brown*, 159 Mich App 21, 23; 406 NW2d 228 (1987).

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecution committed misconduct that denied him a fair trial in several respects. To preserve a claim of prosecutorial misconduct, a defendant must contemporaneously object on the same basis that he asserts as error on appeal. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). We review de novo preserved claims of prosecutorial misconduct to ascertain whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review unpreserved claims of prosecutorial misconduct to determine whether plain error affecting the defendant's substantial rights occurred. *Id.* at 274. "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, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). "Thus, where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *Id*. at 449.

Defendant first argues that the prosecution abused its discretion by issuing the third amended information, which was not consistent with the district court's bindover determination. As discussed in Issue II, an information may be amended at any time to correct a variance between the information and the proofs, unless an amendment would unfairly surprise or prejudice the defendant. *Unger*, 278 Mich App at 221; see also MCL 767.76. Here, the amendment was consistent with the evidence presented at the preliminary examination, it did not involve a new or different crime, it occurred months before trial, and it did not affect defendant's defense that he was not the shooter. Accordingly, the prosecution did not abuse its discretion by issuing the third amended information.

Defendant next contends that the trial prosecutor elicited testimony from Wittebort that improperly commented on defendant's right to counsel. The prosecutor asked Wittebort what attempts he made to arrest defendant after a warrant was issued for his arrest. Wittebort responded that he entered the warrant into the LEIN system, a national database, obtained the addresses of defendant's mother and father, enlisted the assistance of the Oakland County Sheriff's Office because they had more manpower, and looked for defendant in Farmington Hills and Detroit. Wittebort testified that eventually arrangements were made for defendant to turn himself in, accompanied by his father and his attorney. Because Keel did not object to the testimony, our review is limited to plain error affecting defendant's substantial rights. *Abraham*, 256 Mich App at 274.

A prosecutor does not commit misconduct when a witness provides an unresponsive, volunteered answer to a proper question. *People v Waclawski*, 286 Mich App 634, 709-710; 780 NW2d 321 (2009). Further, "[a]s a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, the prosecutor merely asked what attempts had been made to arrest defendant after a warrant was issued for his arrest. Wittebort's response referring to defendant's attorney was unresponsive and was not elicited and the record does not indicate that the prosecutor knew that Wittebort would mention defendant's attorney. Thus, no prosecutorial misconduct occurred.

Defendant also argues that the prosecutor improperly questioned defendant regarding the fact that he was present when witnesses testified at his preliminary examination and he had an opportunity to review the police reports and witness statements. Defendant contends that this line of questioning inappropriately commented on his right to be present in court and implicated his right to counsel. Because Keel did not object to the questioning, our review of this issue is limited to plain error affecting defendant's substantial rights. *Abraham*, 256 Mich App at 274.

Defendant's argument is premised on the notion that the prosecutor was suggesting that the defendant's testimony would be tailored to the evidence that he previously reviewed and heard. Even if the prosecutor's questions were improper, defendant has failed to establish that reversal is warranted because his testimony was not tailored to the evidence previously presented. To the contrary, defendant's claim that Chambers shot Harris was not consistent with any of the other evidence. Thus, even if improper, reversal is not required because the prosecutor's questions did not result in the conviction of an actually innocent defendant or

seriously affect the fairness, integrity, or public reputation of the proceedings, independent of defendant's innocence. *Ackerman*, 257 Mich App at 448-449.

Defendant next argues that the prosecutor committed misconduct by cross-examining him regarding a post-offense shooting that occurred in Detroit, which resulted in him being shot in the stomach. Defendant contends that the prosecutor used the evidence as improper propensity evidence contrary to MRE 404(b) to show that it was more likely that he was guilty of shooting Harris in Pontiac. Defendant asserts that the prosecutor failed to provide the requisite notice to introduce the evidence under MRE 404(b) and that the evidence was more prejudicial than probative. Because Keel did not object to the testimony on the basis of MRE 404(b), our review is limited to plain error affecting defendant's substantial rights. *Abraham*, 256 Mich App at 274.

During defendant's direct examination, he denied owning or carrying a gun. On cross-examination, defendant again testified that he did not own or possess a gun and was not shot during the incident in Pontiac. At this point, the prosecutor inquired whether, at some point shortly after the incident, defendant had shot himself in the stomach. Keel objected on the basis of relevance, and the prosecutor responded that whether defendant had shot himself in the stomach was relevant because it showed that he possessed a gun during the timeframe of the Pontiac incident. The trial court overruled Keel's objection for the limited purpose that the prosecutor asserted. Thereafter, defendant denied shooting himself and testified that someone else had shot him in the back. The prosecutor then inquired of defendant whether part of the delay in turning himself in to the police was because he was recovering from a gunshot wound. On redirect examination, defendant testified that the shooting occurred in Detroit when he was the victim of an attempted robbery.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crime, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The record shows that the prosecutor's questions regarding whether defendant had shot himself in the stomach were not for the purpose of introducing evidence of defendant's other crimes, wrongs, or acts pursuant to MRE 404(b). Rather, the questions were posed to impeach defendant's testimony that he did not own or carry a gun during the timeframe surrounding the Pontiac shooting. Keel opened the door to such impeachment by initially questioning defendant regarding whether he owned or carried a gun. Thus, the prosecutor's questions in that regard were proper.

After the prosecutor asked defendant whether he had shot himself in the stomach shortly after the Pontiac shooting and defendant responded negatively, the prosecutor then asked, "[y]ou were shot by somebody?" Defendant responded, "[y]es," to that question, which was not asked for impeachment purposes because it did not tend to establish that defendant possessed a gun.

The prosecution contends that the purpose of that question and the follow-up questions was to explain the month-long delay it took for defendant to turn himself in to the police after a warrant for his arrest had been issued. Defendant has been in the hospital recovering from the gunshot wound. The prosecution's argument is suspect, however, given that the trial prosecutor argued during closing argument:

> And, what else do you hear for the first time today? Well, you hear that either the Defendant is the killer, or the Defendant is the unluckiest guy on the planet for about thirty (30) days in June to July of 2008, because not only does he go to a drug deal in the middle of Pontiac where he doesn't know anybody and is giving up his thousand dollars ($1000) unarmed to people who are armed . . . .
>
> And then he happens to be present when somebody is shot, although he doesn't look to where the shooting is, then everybody conspires to make him the shooter. . . .
>
> And then, even though he doesn't carry a gun and doesn't do drug deals, he happens to be shot in the gut within thirty (30) days in Detroit . . . .

Thus, it appears that the prosecutor improperly sought to admit evidence regarding the post-offense Detroit shooting to show that it was more likely that defendant was the shooter during the Pontiac incident.

Although the prosecutor's conduct was improper, reversal is not required because the evidence did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of the proceedings, independent of defendant's innocence. *Ackerman*, 257 Mich App at 448-449. The issue presented in this case was whether defendant or Chambers shot Harris. Defendant admitted that he contacted Chambers to purchase cocaine, that he was present at the scene of the Pontiac shooting, and that he had previously been involved in other drug deals with people who were armed with guns. Given defendant's testimony that it was not unusual for him to be involved in drug deals in which weapons were involved, the fact that he was shot within thirty days after the Pontiac incident did not make it any more or less likely that he rather than Chambers committed the shooting. Therefore, the admission of the evidence, although admitted for improper propensity purposes, did not warrant reversal.

Defendant next argues that the prosecutor committed misconduct by identifying photographs of Koch and Upshaw during his opening statement and indicating that neither Koch nor Upshaw would be testifying because Koch was in prison and Upshaw's whereabouts were unknown despite outstanding warrants for her arrest. Defendant asserts that the prosecutor's statements suggested that defendant was guilty by association. Because Keel did not object on the basis of prosecutorial misconduct, our review is limited to plain error affecting defendant's substantial rights. *Abraham*, 256 Mich App at 274.

The prosecutor's mention of Koch and Upshaw during his opening statement was consistent with his responsibility to outline the facts and to explain why they would not be present to testify. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). Moreover, any

alleged error was cured by the trial court's instruction to the jury that the attorneys' statements and comments were not evidence. "Jurors are presumed to follow their instructions." *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011).

Defendant also asserts that the prosecutor's use of information gleaned from an FBI interview of Koch contained in the discovery materials violated defendant's Sixth Amendment right to confrontation because Koch did not testify at trial. Because Keel did not object to the prosecutor's questioning, our review is limited to plain error affecting defendant's substantial rights. *Abraham*, 256 Mich App at 274. The prosecutor questioned defendant as follows:

> *Q.* And what you're telling us is Josh [Koch] is sitting there unarmed, right?
>
> *A.* I don't know if he's armed or not.
>
> *Q.* Okay. So Josh may be carrying his weapon, a three eighty (380) is he carrying [sic]?
>
> *A.* I don't know.
>
> *Q.* You don't know. Have you seen him carry that three eighty (380) before?
>
> *A.* No.
>
> *Q.* Okay. So you don't know now if Josh was armed.
>
> *A.* No.
>
> *Q.* But you weren't armed, right?
>
> *A.* Right.
>
> *Q.* You weren't carrying a three fifty-seven (357)?
>
> *A.* No.
>
> * * *
>
> *Q.* Okay. And, have you ever seen Josh with a Brico (phonetic) three eighty (380) pistol?
>
> *A.* No.
>
> *Q.* Did you ever carry a Torres three fifty-seven (357) revolver?
>
> *A.* No.
>
> *Q.* Never heard of a three fifty-seven (357) revolver?

A. I know what a three fifty-seven (357) is, yes.

Q. Okay. You've been around them, right?

A. Yes.

Q. Okay. Now, you say you didn't own or possess a gun during this time period, is that fair to say?

A. Yes.

The prosecutor's questioning did not violate defendant's right to confront Koch. "[T]he Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony." *People v Ho*, 231 Mich App 178, 190; 585 NW2d 357 (1998) (emphasis in original). In addition, "[t]he specific protections the Confrontation Clause provides apply 'only to statements used as substantive evidence.'" *People v Nunley*, 491 Mich 686, 697; ___ NW2d ___ (2012), quoting *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2001). In this case, Koch did not testify at trial, the report regarding his FBI interview was not admitted as evidence, and defendant testified that neither he nor Koch possessed a weapon. Thus, there was no statement provided by Koch that was admitted as substantive evidence during trial. Accordingly, the Confrontation Clause was inapplicable.

Defendant next contends the prosecutor committed misconduct by expressing his personal opinion regarding defendant's guilt during his rebuttal closing argument. The prosecutor stated:

> The Defendant is guilty of both counts of First Degree Murder. You have the option to choose either First Degree Pre-Meditated or First Degree Felony or both. I say he committed both.

Because Keel did not object to the allegedly improper argument, our review is limited to plain error affecting defendant's substantial rights. *Abraham*, 256 Mich App at 274.

When evaluating a claim of prosecutorial misconduct, we examine the prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 266–267; 531 NW2d 659 (1995). Although a prosecutor may not express a personal opinion regarding a defendant's guilt, he may properly argue the evidence and all reasonable inferences arising from the evidence as it relates to his theory of the case. *Id*. at 282-283. The prosecutor made the challenged remark in this case at the end of his rebuttal closing argument after summarizing the evidence and responding to Keel's closing argument. It is apparent from the record that the remark was not an expression of the prosecutor's personal opinion regarding defendant's guilt but was made in the context of summing up his argument that was based on the evidence presented. Accordingly, the remark was not improper.

Defendant next contends that the prosecutor misstated the law during voir dire. The prosecutor was questioning the prospective jurors regarding their understanding of the term "reasonable doubt" and the prosecutor's burden of proof. The prosecutor inquired, "[d]o you understand that if you have a doubt, a reasonable doubt about something that doesn't relate to

those elements in the case, it doesn't prevent you from finding and coming back with a verdict, do you understand that?" Defendant argues that this statement was erroneous because it failed to include that the jurors must find that defendant was the person who satisfied the elements. Because Keel did not object to the prosecutor's inquiry, our review is limited to plain error affecting defendant's substantial rights. *Abraham*, 256 Mich App at 274.

First and foremost, the prosecutor was merely questioning the prospective jurors regarding their familiarity with legal concepts and was not instructing them on the law. The trial court, rather than the prosecutor, provided preliminary jury instructions pertaining to the presumption of innocence, reasonable doubt, the elements of a crime, and the prosecutor's burden of proof, and directed that the jury was to "take the law as I give it to you." Thus, the record does not establish that the prosecutor committed misconduct.

Defendant also argues that the prosecutor misstated the law during closing argument and that Keel failed to object to the misstatements. Defendant asserts that the prosecutor's explanations of premeditation and reasonable doubt were erroneous. Again, the trial court instructed the jury that it was to follow only the court's instructions on the law, and the trial court correctly instructed the jury on reasonable doubt and the elements of premeditated murder. The trial court's instructions cured any alleged misstatement of law by the prosecutor. See *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). Accordingly, because no plain error occurred, defendant is not entitled to reversal. *Abraham*, 256 Mich App at 274.

Further, defendant argues that Keel rendered ineffective assistance of counsel by failing to object to the alleged instances of prosecutorial misconduct discussed above. As previously discussed, none of the alleged instances of prosecutorial misconduct amounted to plain error affecting defendant's substantial rights. Further, because there does not exist a reasonable probability of a different result if Keel had objected to the alleged prosecutorial misconduct, his failure to do so did not constitute ineffective assistance of counsel. *Uphaus*, 278 Mich App at 185. "Counsel need not make a futile objection." *Petri*, 279 Mich App at 415.

IV. CUMULATIVE ERROR

Finally, defendant contends that he is entitled to a new trial on the basis of the cumulative effect of the numerous errors in this case. "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 minor errors may warrant reversal where the individual errors would not." *Ackerman*, 257 Mich App at 454. The cumulative effect of the errors, however, "must undermine the confidence in the reliability of the verdict before a new trial is granted." *Dobek*, 274 Mich App at 106. Because defendant has failed to establish error

that undermines confidence in the reliability of the verdict, and he was not denied a fair trial, he is entitled to no relief.

Affirmed in part, and reversed in part.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio