STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 10, 2013
v	No. 311189 Wayne Circuit Court
COURTNEY TERRILL SWIFT, Defendant-Appellant.	LC No. 11-012252-FC

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, and he was sentenced to 300 to 600 months' imprisonment. He now appeals as of right. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On July 26, 2010, at approximately 2:45 p.m., Christina George received a call on her cell phone from her son, Ramone George. The call was made from the phone of "Tae," a friend of Ramone. Approximately five minutes later, Christina received another call from the number of "Nell," another acquaintance of Ramone. Christina was familiar with Nell, later identified as defendant, because she received calls, and often answered them, from Nell's number, and Nell would ask to speak with Ramone. Additionally, Christina had seen Nell pull up to the George house in a black SUV, either a Tahoe or Yukon, several times a week from May to July 2010. Christina did not pick up the initial call from Nell's phone. Christina received a second call from Nell's phone approximately two minutes after the initial call. Christina answered the call, and had a conversation with Ramone that caused her to change her travel plans again, because Ramone would not need to be picked up. Christina believed that Ramone sounded nervous during the call.

At approximately 3:00 p.m., a witness was sitting in her car at a gas station in Detroit when she heard what she believed to be four or five gunshots. She saw two black males "scuffling." A larger male was swinging at a smaller male with his hands, and the bigger male was carrying a gun. The smaller male appeared to be a teenager, aged 16 to 17 years, with a skinny build. The smaller man ran across the street into an automotive collision shop, and the bigger male chased him. A black Tahoe or Yukon followed, and ultimately picked the males up.

At approximately 3:00 p.m., another witness was working at his automotive repair shop, which was located across the street from the gas station where the previous witness had observed

the males scuffling, when he noticed a young teenager attempting to hide from a Tahoe or Suburban. A black male entered the shop, grabbed the teenager, and forced him into the black SUV. The witness later identified the larger male as defendant, as well as the driver of the black SUV, in a photo lineup, but testified that the police officer conducting the lineup somewhat covered each photo except the two photos that he chose.

At some point between 3:00 p.m. and 4:00 p.m., Venus Thomas heard a young man screaming on her porch from inside her home on Philip Street in Detroit, which was located one to two blocks away from the gas station and the collision shop. Thomas ran outside and observed an injured Ramone sitting on her porch. Ramone gave Thomas Christina's cell phone number, and Thomas called Christina to inform her that Ramone had been injured. Christina called her brother, Kenny George, and asked him to meet her at Thomas's house because Ramone had been hurt.

Upon arrival, Christina observed a badly injured Ramone sitting on Thomas's porch. Kenny asked Ramone who his attackers were, and Ramone responded, "that nigga Nell." Christina loaded Ramone into her car and drove him to a nearby hospital five minutes away. During the drive, Ramone told Christina that "they beat him and they hurt him real bad," and that "he felt that he was going to die." Ramone told Christina at least four times that it had been "Nell and Hitman." Ramone subsequently slipped into a coma and later died from his injuries.

Deidre George, Ramone's sister, testified that she knew defendant from around the neighborhood, and defendant and Ramone often played basketball together. Deidre also knew that defendant was often seen driving a black Tahoe. When Deidre learned of Ramone's injuries, she called to inform her cousin, Cortez George. Cortez, also a cousin to Ramone, was familiar with defendant because defendant had been "looking for" Ramone in the days leading up to July 26, 2010. Specifically, defendant had approached Cortez seven times in the week preceding July 26, 2010, in a black Tahoe and asked Cortez if he knew where Ramone was, and to tell Ramone that defendant was looking for him. When Cortez learned that Ramone had been injured, Cortez called an unidentified phone number and spoke to a "Michelle," who was the "baby momma" of "Hitman," an associate of defendant. Cortez asked to speak to defendant, and Michelle put defendant on the line. Cortez asked defendant what had happened to Ramone, and defendant initially claimed not to know. However, Cortez asked again, and defendant stated that Ramone "should have never been stealing." Cortez laughed and said, "come on," to which defendant replied, "and if you say something you could be next," and hung up.

The jury acquitted defendant of first-degree murder, but convicted him of the lesser charge of second-degree murder. After filing his claim of appeal, defendant filed a postconviction motion to remand, arguing that his due process rights were violated due to prosecutorial misconduct and improper jury instructions. Additionally, defendant argued that he was denied the effective assistance of counsel at trial. This Court denied defendant's motion to remand "for the failure to demonstrate by affidavit or offer of proof the facts to be established at a hearing on remand or to establish that the issues should be initially decided by the trial court." *People v Swift*, unpublished order of the Court of Appeals, entered October 1, 2013 (Docket No. 311189).

II. HEARSAY

Defendant first argues that Christina George's cell phone contact information should not have been admitted into evidence because the phone's indication that defendant was calling was inadmissible hearsay. The prosecutor concedes error. Further, defendant contends that because the remaining untainted evidence was weak, the admission of the cell phone information was outcome determinative of the case. While we agree that the trial court abused its discretion in admitting the evidence, we disagree with defendant's contention that the error was outcome determinative.

This Court reviews the evidentiary rulings of a trial court for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In instances of preserved, nonconstitutional error, there is a presumption that the error "is not a ground for 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 Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). An error is outcome determinative if it undermined the reliability of the verdict. *Id.* A reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. *Id.*

Because Christina's six children did not possess cell phones, Christina allowed her children to use her cell phone, including inputting numbers as preset "contacts" in the phone's directory. Christina estimated that Ramone had input approximately 40 phone numbers into her phone as "contacts." Defendant argues that, at some point, an unknown person – ostensibly Ramone – input a phone number into Christina's cell phone and saved that number under defendant's nickname and that the inputting of the number into the phone was an assertion that the inputted phone number belonged to defendant.

Hearsay is defined as a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A statement is defined as "an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Generally, "nothing is an assertion unless intended to be one" by the declarant. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 216; 579 NW2d 82 (1998), modified on other grounds 458 Mich 862 (1998) quoting Advisory Committee on Rules of Evidence for FRE 801(a).

The trial court determined that the cell phone's representation of defendant's phone number was not hearsay because it did not constitute a statement. Specifically, the trial court compared the cell phone contact information to the ringing of church bells at a specific time, a tornado siren in bad weather, or a digital clock representing the time of day. However, at some point an unknown person input a phone number into Christina's cell phone and saved that number under defendant's nickname. Arguably, this inputting of the number into the phone was an assertion that the inputted phone number belonged to defendant. The prosecution offered the contact information to prove that it was defendant's phone that called Christina prior to Ramone's beating. Because Ramone used Christina's phone to communicate with friends and acquaintances, Ramone's act of saving certain numbers to corresponding names is an assertion that those numbers belong to the corresponding names. No evidence was presented at trial to show that Ramone had a reason to assign phone numbers to fake names or to unrelated names in Christina's phone. Rather, the evidence showed that Ramone spent time with defendant frequently, and that Ramone and defendant spoke via Christina's cell phone. The input of "Nell"

to a corresponding number was an assertion, an assertion intended to reflect on Christina's phone whenever defendant called. Because the prosecution offered the contact information to prove the identity of the caller to Christina's phone as defendant, the assertion was offered to prove the truth of the matter asserted. Accordingly, as defendant argues and the prosecution agrees, it was an abuse of discretion for the trial court to admit the cell phone contact information into evidence.[1]

However, we conclude that the error was harmless. The strength and weight of the untainted evidence was overwhelming to the extent that the identity of the owner of the phone that called Christina prior to Ramone's beating was not outcome determinative. Defendant was known by multiple witnesses to be an acquaintance of Ramone who spent significant amounts of time with Ramone in the weeks leading up to the beating. Defendant had been looking for Ramone in the days leading up to the beating. Defendant's black Tahoe was seen at the Zoom gas station by multiple witnesses, as well as defendant swinging at Ramone with his fists and forcing him into the Tahoe shortly before the beating occurred. After he was beaten, but before he lapsed into a coma, Ramone repeatedly stated that defendant had been one of his attackers. Cortez spoke with defendant on the day of the beating, and defendant stated that Ramone should not have been stealing, and that if Cortez did not keep his mouth shut, he could be next. In the context of the strength of the evidence that directly connects defendant to Ramone's death, the identification of defendant's phone to the calls made to Christina prior to the beating is a minor, possibly cumulative piece of evidence. The admission of the contact information did not undermine the reliability of the verdict, nor was it outcome determinative. Accordingly, even if the admission of the information was erroneous, the error was harmless.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that insufficient evidence existed on the record to prove defendant's guilt beyond a reasonable doubt. Specifically, defendant contends that the inconsistent testimony of witnesses and lack of reliable eye-witnesses was such that no reasonable jury could have convicted defendant beyond a reasonable doubt. We disagree.

> We review a defendant's challenge to the sufficiency of the evidence de novo. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a

[1] Defendant also argues that the admission of the contact information was a violation of defendant's rights under the Confrontation Clause. US Const, Am VI, XIV; Const 1963, art 1, §§ 17, 20. However, the admission of nontestimonial hearsay into evidence does not violate the Confrontation Clause. *People v Nunley*, 491 Mich 686, 715; 821 NW2d 642 (2012). Evidence is testimonial if the declarant would reasonably believe that the statement would be used in a later court proceeding. *Id.* at 689. There is no evidence on the record to suggest that the person who input the cell phone number into Christina's phone did so in potential contemplation of that information being used at trial. Importantly, defendant does not make any factual or legal argument implicating the Confrontation Clause, other than describing that clause in his brief on appeal. Without any argument beyond the MRE existing in defendant's brief on appeal, no constitutional arguments are addressed in this report.

> rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. We resolve all conflicts in the evidence in favor of the prosecution. [*People v Kosik*, ___ Mich App ___; ___ NW2d ___ (Docket No. 312518, issued November 12, 2013) slip op p 2.]

"In order to convict a defendant of second-degree murder, the prosecution must prove: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). "Malice 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." *Id.*

Second-degree murder may also be proven through an aiding and abetting theory. *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). The three elements for a conviction under an aiding and abetting theory are: (1) the crime was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted in the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended the crime at the time the defendant gave aid or encouragement. *Id.* at 6.

There is sufficient evidence for a rational jury to conclude that defendant caused Ramone's death with malice and without justification or excuse. It is undisputed that Ramone died as a result of a blunt force trauma to the head. Ramone personally told Christina and Kenny George that he had been attacked by defendant, and implicated defendant by name. Though Venus Thomas denied it at trial, Officer Carl Mack testified that Thomas told him after the incident that she had seen defendant and one other male beating Ramone with a baseball bat outside her house. Thomas also told Officer Mack that when she went outside, defendant ran away down the street. Further, defendant was seen earlier in the day scuffling with Ramone outside the gas station, chasing Ramone into a nearby collision shop, and then forcing Ramone into defendant's black Tahoe. Finally, defendant told Cortez shortly after the beating that Ramone should not have been stealing, and that if Cortez said anything about the incident, Cortez could be next. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational jury to convict defendant of second-degree murder.

IV. PROSECUTORIAL MISCONDUCT

In his Standard 4 brief, defendant argues that the prosecutor committed prosecutorial misconduct by attempting to vouch for the credibility of witnesses and providing the jury with an interpretation of defendant's posture at trial. Specifically, defendant contends that the prosecutor's statement that the witnesses called by the prosecution were "good people," and that

the George family members were "not that type" to fabricate their testimony, was misconduct. We disagree.

Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To avoid forfeiture of the claim, the defendant must show that: (1) error occurred, (2) the error was clear or obvious, and (3) the plain error affected substantial rights; specifically, the error affected the outcome of the lower court proceedings. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

"[T]he test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Courts make determinations of prosecutorial misconduct on a case by case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments made by a prosecutor must be read as a whole and evaluated in the context of a defendant's arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor is free to argue that the defendant has failed to produce evidence upon which it relies at trial. *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). And while a prosecutor may not vouch for the credibility of a witness with the implication that the prosecutor has special knowledge of the truthfulness of that witness, a prosecutor may argue that the defendant or a witness is worthy or not worthy of belief. *Dobek*, 274 Mich App at 67. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

Defendant's argument that it was prosecutorial misconduct for the prosecutor to comment on defendant's posture during the trial is without merit. The prosecutor's specific statements relating to defendant's posture came during closing argument, when the prosecutor said "[defendant] wouldn't even look at the witnesses, wouldn't look at them. That's interesting. I'm not going to comment further about that, but you would think he would turn around and look, but he doesn't." The prosecutor's statement was apparently in response to an instance during the trial when the court had to ask defendant to look at witnesses for the purpose of in-court identification. However, neither the prosecution nor the trial judge made any other comments about defendant's posture during the course of the trial. Further, the trial court specifically instructed the jury that statements made by the lawyers during the trial could not be considered as evidence. In the context of the all the evidence presented at trial, there is no indication that the prosecutor's comment even suggested that defendant's posture meant anything at all.

Additionally, the prosecutor's comments on the trustworthiness of witnesses was not plain error. Specifically, the prosecutor stated at trial that the witnesses called by the prosecution were "good people" and that George family members were "not those types" of people to fabricate their story to implicate defendant. The prosecutor also implied that because defendant did not impeach any the prosecutor's witnesses' credibility, those witnesses were all credible and believable. Because defendant's counsel made the argument in his closing statement that the George family members had banded together to fabricate a story, it was permissible for the prosecution to point out that defendant failed to present evidence to support that claim. *McGhee*, 268 Mich App at 634.

Further, the prosecutor pointing out that witnesses were "good people" is permissible as an argument that the witnesses were worthy of belief by the jury. The prosecutor did not base that statement on any purported special knowledge of those witnesses. Further, the trial court instructed the jury that it was to determine the credibility and weight of the evidence and

witnesses. Juries are presumed to follow their instructions. *People v Snyder*, 301 Mich App 99, 112; 835 NW2d 608 (2013).

V. JURY INSTRUCTIONS

In his Standard 4 brief, defendant next argues that the trial court committed error requiring reversal when it ignored, disregarded, and omitted portions of several jury instructions provided to the jury before deliberations. Specifically, defendant contends that several jury instructions provided at trial failed to cover the substance of those instructions, which resulted in a miscarriage of justice and a violation of defendant's due process rights. Further, defendant argues the error by the trial court was not harmless because the reliability of the verdict was undermined through the faulty instructions. We disagree. Defense counsel expressed satisfaction with the jury instructions as given, thereby waiving any claim of instructional error. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). However, because defendant also argues that counsel was ineffective for failing to raise the issue, we will review this unpreserved claim of error for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, trial courts are required to provide juries with instructions that include all of the elements of a crime charged, and any material issues, defenses, or theories for which there is supporting evidence on the record. *McGhee*, 268 Mich App at 606. Juries are presumed to have followed the instructions they are provided by the trial court. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). However, if correct and incorrect instructions are read to the jury, the jury is presumed to have followed the incorrect instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). An omission in an instruction is not error if the instructions as a whole covered the substance of the omitted portion. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Defendant contends that the trial court committed plain error in its readings of CJI2d 3.1, 3.6, 3.11, 3.14, 16.1, and 8.1. Even if a jury instruction is not read verbatim or is imperfect in some other way, the instruction is not an error if it fairly presented the issues to the jury and sufficiently protected the defendant's rights. *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012). Appellate review of jury instructions should consider the instructions as a whole, rather than as individual parts, to establish an error. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011).

CJI2d 3.1 provides in pertinent part:

> (4) It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say. At various times, I have already given you some instructions about the law. You must take all my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others.

The trial judge did not read CJI2d 3.1 verbatim; rather, the judge stated that "it is my duty to instruct you on the law and you must take the law as I give it to you, . . . it is your job to decide what the facts of the case [sic], to apply the law as I give it to you and in that way decide the case." It is true that the trial court omitted the portion of CJI2d 3.1 regarding the prohibition of paying attention to some instructions and ignoring others. However, the trial court did adequately summarize CJI2d 3.1 to the extent that any reasonable juror would have concluded

that the law must be taken as provided by the judge, and that was the law upon which the case should be decided. Because the issues were fairly presented here, there was no plain error regarding CJI2d 3.1.

CJI2d 3.6 provides, in pertinent part:

> (5) However, you may conclude that a witness deliberately lied about something that is important to how you decide the case. If so, you may choose not to accept anything that witness said. On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest.

Here, regarding CJI2d 3.6, the trial court did not read the language of the model instruction verbatim, but did instruct the jury that "you must decide which testimony you accept" where witnesses contradict each other. Additionally, the court stated, "you do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony." Defendant does not demonstrate that the court's instruction departs in any material respect from the language of CJI2d 3.6. Instead, the court adequately summarized CJI2d 3.6, and the wording provided by the court was not plain error.

Regarding CJI2d 3.11, the trial judge instructed the jury on the elements of both first-degree murder and second-degree murder. Defendant contends here that the court failed to instruct the jury properly on the order of deliberations. CJI2d 3.11 states, in pertinent part:

> (6) In this case, there are several different crimes that you may consider. When you discuss the case, you must consider the crime of *[name principal charge]* first. **[If you all agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict.]** If you believe that the defendant is not guilty of *[name principal charge]* or if you cannot agree about that crime, you should consider the less serious crime of *[name less serious charge]*. **[You decide how long to spend on** *(name principal charge)* **before discussing** *(name less serious charge).* **You can go back to** *(name principal charge)* **after discussing** *(name less serious charge)* **if you want to.]**

Here, the trial court stated that "you may return a verdict of guilty of murder in the first degree, guilty of murder in the second degree, as the lesser included, or not guilty. So it's one or the other, not guilty, murder in the first degree, or murder in the second degree." Here, the trial court did instruct the jurors that they could find defendant guilty of first-degree murder, second-degree murder, or neither. However, the trial court did not provide the jury with the order of their deliberations, i.e., that the jury should deliberate on first-degree murder first, then consider the lesser included offense if the verdict for first-degree murder was not guilty.

Michigan courts are generally not required to adhere to the exact standard jury instructions. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). And the Michigan Supreme Court has noted that CJI2d 3.11 specifically "is a sound instruction, and we continue to direct that it be given." *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995). "[A]n instruction on this subject requires reversal only if it has an 'undue tendency of coercion,' not if it merely fails to contain the same words as the ABA standard." *Id.* Here, defendant was ultimately convicted of the lesser included offense, second-degree murder, and there is no

conceivable argument that an order of deliberations instruction would have resulted in an acquittal. The jury apparently found defendant guilty of the lesser included offense; accordingly, the failure of the court to read the order of deliberations instruction was harmless error.

Regarding CJI2d 3.14, the trial court instructed the jury that in order to pass along a note to the judge, the foreperson would need to knock on the door and hand the note to court staff; this substantially tracks the language of the model instruction. CJI2d 3.14 provides, in pertinent part:

> (1) If you want to communicate with me while you are in the jury room, please have your foreperson write a note and give it to the bailiff. It is not proper for you to talk directly with the judge, lawyers, court officers, or other people involved in the case.

The trial court did not instruct the jury that contact with the judge, lawyers, or court officers was prohibited in the jury instructions at the end of the trial, but the court did instruct the jury at the start of the trial that "you can't discuss the case with anyone, including your family or friends." Additionally, the court stated, "you can't talk to the defendant, the lawyers, or the witnesses about anything at all even if it has nothing to do with the case." Defendant does not make any argument regarding why the trial judge's instructions, taken together, were improper. Because the court adequately summarized CJI2d 3.14 for the jury during the trial, the instruction was not plain error.

Regarding CJI2d 16.1, the trial court apparently briefly misspoke before correcting itself when it said, "the defendant is charged in the first count or the one and only count with the crime of murder in the second—first degree premeditated murder." However, the trial court ultimately described all elements of both first-degree murder and second-degree murder to the jury. CJI2d 16.1 provides, in pertinent part, "(1) [t]he defendant is charged with the crime of first-degree premeditated murder." Defendant does not make an argument that this misstatement and correction resulted in a material departure from the model instruction. Because the judge quickly corrected his misstatement, the instruction was not plain error.

Finally, regarding CJI2d 8.1, the trial court stated that one of the elements of aiding and abetting murder is "the defendant . . . must have known that the person intended its commission at the time of giving the assistance." CJI2d 8.1(3) provides, in pertinent part:

> (c) Third, at that time the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission or that the crime alleged was a natural and probable consequence of the commission of the crime intended.

However, the trial court's instruction here conveys the same idea, since the court is clearly describing the elements for "aiding and abetting," and refers to assistance between persons in committing a crime in the same sentence. The only meaningful difference between the model instruction and the instruction here is the model instruction uses the language "known that the other person intended its commission." Defendant does not provide an argument of why "the person" is a material departure from "the other person" language of the model instruction. Instead, the trial court adequately summarized CJI2d 8.1, and the instruction was not plain error.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, in defendant's Standard 4 brief, he argues that defense counsel's failure to object to the prosecutor's statements during closing argument, and the failure to object to the trial court's jury instructions, was ineffective assistance of counsel. We disagree. Review of an unpreserved claim of ineffective assistance of counsel is limited to the facts on the existing record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Criminal defendants have a right under the United States and Michigan Constitutions to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a criminal defendant must show that (1) under prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; (2) but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different; and (3) the proceedings were fundamentally unfair or unreliable. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Michigan Courts employ a presumption that counsel's performance is effective, and there is a heavy burden upon the defendant to prove otherwise. *Vaughn*, 491 Mich at 670. This Court will not substitute its judgment for that of defense counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Specifically, counsel's decision to not make objections can be sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

As previously discussed, the prosecutor's comments during closing were not improper and the trial court's jury instructions did not deprive defendant of a fair trial. As such, defense counsel was not required to make meritless objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan