IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2021-KA-00066-COA

ALIZE JOEMISE BOYD A/K/A ALIZE BOYD **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	12/04/2020
TRIAL JUDGE:	HON. MICHAEL PAUL MILLS JR.
COURT FROM WHICH APPEALED:	ALCORN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: MOLLIE MARIE McMILLIN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALEXANDRA LEBRON
DISTRICT ATTORNEY:	JOHN DAVID WEDDLE
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 07/26/2022
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BARNES, C.J., WESTBROOKS AND EMFINGER, JJ.

EMFINGER, J., FOR THE COURT:

¶1. On April 25, 2019, an Alcorn County grand jury indicted Alize Joemise Boyd for the April 16, 2018 murders of Jason Wayne Lovell and Christopher Eric Smith, as well as the aggravated assault of Paula Genise Russell. After a jury trial on November 30 through December 4, 2020, Boyd was convicted of all three counts. The circuit judge sentenced Boyd to two life sentences for the murders of Lovell and Smith and to a term of twenty years for the aggravated assault of Russell, all to be served consecutively in the custody of the Mississippi Department of Corrections. On appeal, Boyd contends that he received ineffective assistance of counsel at trial.

FACTS AND PROCEDURAL HISTORY

¶2. On April 16, 2018, Boyd and Smith arranged for Smith to sell Boyd a quantity of marijuana. According to Boyd, the arrangements were made by a form of messaging on Facebook. They agreed that Boyd would buy a quarter pound, or 112 grams, of marijuana from Smith for $900. Smith had told Boyd that Russell would have to obtain the marijuana. After more messaging, Boyd met Smith at Russell's apartment and they waited in the living room area for Russell to arrive with the marijuana. Russell and Lovell came into the apartment together. Lovell followed Russell into the kitchen, then he went into the bedroom. Smith then went into the kitchen and obtained the marijuana from Russell. Smith then brought the marijuana to Boyd, but it was only about 28 grams, which was three ounces short of the agreed amount. At this point, the State's version of the events and Boyd's version of the events begin to conflict.

¶3. Russell testified that while she could not see the transaction between Boyd and Smith, she could hear their discussion. She testified that Smith told Boyd that "you can get over on anybody else in this town, bro, but you can't get over on her." Russell then saw Boyd moving toward the door and saw Smith knock him to the floor and the two started fighting on the floor. The State contends that Boyd was trying to leave without paying for the marijuana and that is what caused the initial altercation.

¶4. Boyd contends that Smith's plan was to rob him once he came into the apartment with the money to buy a quarter pound of marijuana. The defense placed that version of events before the jury through the testimony of Nathan Shelton. As discussed below, Shelton

testified that Smith had asked him earlier that day to help him rob someone coming to buy marijuana. Shelton declined and was not present at the time of these events. Boyd contends that he was attacked by the men in an attempt to rob him and that he fired his weapon in self-defense. Boyd testified that they did take money from him, in addition to taking back the marijuana. Boyd's testimony is unclear as to the amount of money they took.

¶5. In any event, Russell testified that when she saw the altercation, she yelled for Lovell to help. According to Russell, Lovell came in and jumped on both men who were still on the floor. Lovell helped Smith hold Boyd down and told Russell to get the marijuana out of Boyd's hand. Russell took the marijuana from Boyd while all three were still on the floor. Russell said that she was then standing in the hallway when Lovell got up and told Smith to stop. Russell stated that the fight had then stopped and the men had "dispersed." However, according to Russell, when Boyd got up, he pulled out a gun. When she saw Boyd with a gun, Russell retreated into her bedroom. While she could not see the men at this point, she heard her front door close and then heard gunshots that sounded "very far off." She looked into the living room and "there was like a ball of sulfur, like a smoke cloud." Smith and Lovell then came running backwards into the bedroom. Russell stated that Smith and Lovell were holding their hands out and did not have any weapons in their hands. Russell testified that Smith was shot first, more than one time, and he fell. Boyd was then turning the gun towards her and Lovell jumped in front of her. Lovell was shot in the chest and fell against Russell. Then, with Lovell lying on Russell, Boyd walked up to Lovell and shot him in the head. Russell testified that the shot blew Lovell's "brains and stuff like all over my face and

down my mouth." Boyd then told Russell, "give me that s**t, bitch," she handed him the marijuana, and Boyd ran out. Russell then realized that she had been shot in the arm. She believes that Smith and Lovell were both already dead. She found a phone on the floor and called 911.

¶6. Law enforcement processed the scene. Photographs were taken and spent shell casings were recovered. Investigator Marolt testified that two casings were found outside the apartment and that he found evidence that two shots had been fired into the apartment, from outside. Marolt testified that one shot went through the outside door frame and into an inner wall. He further testified that another shell casing was found in the living room, another in the hallway leading to the bedroom, and six in the bedroom. A total of ten shell casings were found at the scene. According to Marolt, based upon the blood evidence found at the scene, all the victims were shot in the bedroom.

¶7. Melissa DeBerry is a forensic scientist employed by the Mississippi Forensics Laboratory and assigned to the firearms and toolmark examination section. She was accepted as an expert witness in the field of firearms and tooling and testified that she conducted an examination of the shell casings found at the scene, the projectiles recovered from the bodies of the victims, and the firearm submitted. She testified her tests showed that all the projectiles and all the spent shell casings were fired from the same weapon, the firearm that was recovered from Boyd.

¶8. The jury rejected Boyd's claim of self-defense and returned verdicts of guilty on two counts of murder and one count of aggravated assault. Boyd appeals seeking a new trial.

STANDARD OF REVIEW

¶9. Concerning appellate review of claims of ineffective assistance of counsel at trial, the Mississippi Supreme Court explained in *Cork v. State*, 329 So. 3d 1183, 1191-92 (¶¶31-33) (Miss. 2021):

> "[G]enerally, ineffective-assistance-of-counsel claims are more appropriately brought during post-conviction proceedings." *Dartez v. State*, 177 So. 3d 420, 422-23 (¶18) (Miss. 2015) (citing *Archer v. State*, 986 So. 2d 951 (Miss. 2008)). The Court addresses ineffective assistance of counsel claims on direct appeal only when "[1] the record affirmatively shows ineffectiveness of constitutional dimensions, or [2] the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc., are not needed." *Bell v. State*, 202 So. 3d 1239, 1242 (¶12) (Miss. 2016) (alterations in original) (internal quotation marks omitted) (quoting *Read v. State*, 430 So. 2d 832, [841] (Miss. 1983)). Because the record here suffices, we address Cork's ineffective assistance claims on direct appeal.
>
> "[T]o prevail on an ineffective-assistance-of-counsel claim, a defendant must first prove that his counsel was deficient, which requires showing that 'counsel made errors so serious that he or she was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" *Chamberlin v. State*, 55 So. 3d 1046, 1050 (¶4) (Miss. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Secondly, a defendant must prove that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. (quoting *Strickland*, 466 U.S. at 687).
>
> The Court "strongly presume[s] that counsel's conduct falls within the wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy." *Id*. at (¶5) (internal quotation marks omitted) (quoting *Liddell v. State*, 7 So. 3d 217, 219 (¶6) (Miss. 2009)). Thus, "defense counsel is presumed competent," and "even where professional error is proven, this Court must determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id*.

ANALYSIS

¶10. Boyd's sole contention on appeal is that he was denied his constitutional right to effective assistance of counsel at trial. Boyd identifies four instances in which he contends his trial counsel was ineffective. As noted above, such claims are generally more appropriately brought in post-conviction proceedings; however, Boyd is represented by new counsel on appeal. After our review of Boyd's claims, we find the relevant facts and issues are fully apparent from the record and that the record "affirmatively shows" that Boyd's claims are without merit.[1] Therefore, we will address each of his claims of ineffective assistance of counsel separately below.

I. Counsel's Failure to Request a Jury Instruction Regarding Imperfect Self-Defense Manslaughter

¶11. Boyd's appellate counsel claims that a jury instruction regarding imperfect self-defense was supported by the evidence at trial; however, we are not directed to such evidence in the record. Boyd presents no argument as to how the jury could have rejected his self-defense claim but found that imperfect self-defense applies under the facts of this case. In any event, Boyd now claims that trial counsel's failure to request an imperfect self-defense instruction constituted reversible error.

¶12. It is clear that Boyd's trial strategy was to show that he acted in necessary self-defense. He testified that after he paid Smith $250 for twenty-eight grams of marijuana, he headed toward the door of the apartment to leave. At that point he was struck in the back of the head and knocked to the ground by Smith. According to Boyd, Russell then called Lovell

[1] *See Ross v. State*, 288 So. 3d 317, 324 (¶29) (Miss. 2020); *Ellis v. State*, 281 So. 3d 1092, 1099 (¶20) (Miss. Ct. App. 2019).

who joined Smith in holding Boyd down and beating him. They held him down so that Russell could get the marijuana back and she took it from Boyd. Boyd said that Smith hit him again in the head with the doorstopper and knocked him unconscious. When he regained consciousness, Boyd testified that Smith and Lovell were dragging him to the bedroom. Each had one leg and Boyd could not get away from them. Boyd said that when they realized that he was still alive, Smith and Lovell started talking about getting the knives. At that point, because he thought he was going to be killed, Boyd testified that he pulled his gun out of his hoodie and started shooting. He told the jury that he shot until he "was out of bodily-like harm."

¶13. Based upon Boyd's prior statement to law enforcement and, ultimately, his trial testimony, the defense strategy was to present Boyd's claim of self-defense to the jury. Counsel's opening statement and closing argument were based upon Boyd's claim of self-defense. His counsel submitted, and the court approved, appropriate self-defense instructions which were given to the jury. Now, on appeal, after the jury rejected Boyd's claim of self-defense, Boyd contends, through new counsel, that his trial counsel was ineffective because he did not request an imperfect self-defense instruction.

¶14. In a similar case where the defendant claimed ineffective assistance of counsel for failure to seek an imperfect self-defense instruction, the court stated in *Bernard v. State*, 288 So. 3d 301, 313 (¶¶44-45) (Miss. 2019):

> Bernard also argues his lawyer was ineffective for not requesting an imperfect self-defense instruction. Again, Bernard must prove his counsel's conduct was deficient and prejudicial. *Woods* [*v. State*], 242 So. 3d [47,] 55 [(Miss. 2018)].

> "Unlike true self-defense, imperfect self-defense is not a defense to a criminal act." *Ronk v. State*, 172 So. 3d 1112, 1126 (Miss. 2015). "Rather, under the theory of imperfect self-defense, 'an intentional killing may be considered manslaughter if done without malice but under a bona fide (but unfounded) belief that it was necessary to prevent death or great bodily harm.'" *Id*. (quoting *Wade v. State*, 748 So. 2d 771, 775 (Miss. 1999)). So it carries with it criminal culpability and differs from the objective reasonableness of an actor engaged in true self-defense constituting a justifiable homicide. *Brown v. State*, 222 So. 3d 302, 307 (Miss. 2017). Based on these punitive and evidentiary distinctions, Bernard's trial lawyer may have very well opted to forego an imperfect self-defense instruction. It is obvious from the record that he pursued a pure self-defense theory and Castle Doctrine defense.

In the present case, defense counsel pursued a self-defense strategy that relied upon Boyd's testimony that Smith was the initial aggressor, that Lovell joined Smith in the attack on Boyd to steal his money, and that Boyd reacted in necessary self-defense. The fact that Smith initiated the physical confrontation is supported by the testimony of a State's witness, Russell, who was the sole survivor of the shootings. Boyd has not shown how trial counsel's choice to focus on self-defense was anything other than sound trial strategy, under the facts of this case.

¶15. While Boyd argues that "there can be no strategic advantage from not requesting the manslaughter instruction," he offers no further argument in support of that contention. He points to no record evidence that he had a "bona fide, but unfounded" belief that the use of deadly force was necessary to save his own life. *Bernard*, 288 So. 3d at 313 (¶45). To argue imperfect self-defense, counsel would have had to undermine Boyd's testimony and his claim of actual self-defense. Counsel would have had to argue that Boyd thought that he was going to be killed, but that his fear was unfounded.

¶16. Boyd offers nothing that overcomes the presumption that his trial counsel's decisions

in this regard were strategic. *Woods v. State*, 242 So. 3d 47, 56 (¶34) (Miss. 2018). Under the facts of this case, we find that "it is conceivable that [Boyd's] trial counsel did not request [an imperfect self-defense instruction] as part of his and her strategy." *Id*. at 57 (¶40). As a result, even if we assume for sake of argument that Boyd would have been entitled to an imperfect self-defense instruction,[2] he did not show that his trial counsel's failure to request this instruction constituted deficient performance. Further, Boyd has not shown that but for his trial counsel's failure to request an imperfect self-defense instruction, the results of the trial would have been different.

II. Counsel's Failure to Object to Investigator Marolt's Testimony Concerning Exhibits 89 and 90 and their Admission into Evidence

¶17. During Marolt's testimony, the prosecution questioned him about Exhibits 89 and 90. These were photographs of Facebook messages taken from Russell's phone, which purported to be a conversation between Peso Montana (Boyd) and Smith. Marolt explained that the messages are generally discussing how and when they would meet, on the day of the murders, for Smith to sell Boyd marijuana. Boyd argues that the "messages are unauthenticated hearsay and inadmissible."

¶18. These exhibits were admitted into evidence, prior to Marolt's testimony, by agreement of both the State and defense. Because the authenticity of the exhibits was not questioned, the State offered no proof of authenticity prior to their admission. The issue presented is whether trial counsel was ineffective for allowing the exhibits to be admitted without

[2] Under the facts of this case, there is no evidentiary basis for an imperfect self-defense instruction.

objecting on the basis of their authenticity.

¶19. In *Falcon v. State*, 311 So. 3d 1186, 1188-89 (¶¶7-8) (Miss. Ct. App. 2020), we explained:

> To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. M.R.E. 901(a) . . . . Thus, under Rule 901, "[a] party need only make a prima facie showing of authenticity, not a full argument on admissibility. Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court." *Garcia v. State*, 300 So. 3d 945, 974 (¶94) (Miss. 2020) . . . (quoting *Walters v. State*, 206 So. 3d 524, 535 (¶32) (Miss. 2016)) . . . . "In other words, the [proponent of the evidence is] not required to rule out all possibilities inconsistent with authenticity." *Id*. (quotation marks omitted). "The only requirement is that there has been substantial evidence from which [the jury] could infer that the [evidence] was authentic." *Young v. Guild*, 7 So. 3d 251, 262 (¶36) (Miss. 2009) (quoting *Sewell v. State*, 721 So. 2d 129, 140 (¶60) (Miss. 1998)).
>
> Evidence can be authenticated in a number of different ways. Rule 901 lists nine specific "examples" of viable methods of authentication, but it also makes clear that those are "examples only" and "not a complete list." M.R.E. 901(b). Relevant to this case, our Supreme Court has stated that "a prima facie showing of authenticity" of Facebook messages may be established by showing that "the purported sender respond[ed] to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication." *Smith v. State*, 136 So. 3d 424, 433 (¶21) (Miss. 2014).

¶20. While there was no hearing as to the authenticity of these exhibits, there are facts in the record to support Boyd's trial counsel's strategic decision not to challenge their admission. First, Boyd had given law enforcement a statement that is consistent with the content of the messages. Second, the profile on the Facebook messages is for "Peso," which Boyd admitted, in his statement to law enforcement, is his alias on Facebook. Finally, Boyd's testimony at trial is consistent with the content of Exhibits 89 and 90. These messages also

support Boyd's contention that Smith intentionally lured Boyd to the apartment with the intent to rob him, as shown by the testimony of Nathan Shelton discussed below.

¶21. While the content of these Facebook messages is consistent with the facts as set forth by the testimony of both Boyd and Russell, "ultimately, whether [Boyd] sent the messages was a factual issue for the jury - not the trial court or this Court - to decide." *Id*. at 1189 (¶10). It follows that the failure of trial counsel to object to the admission of Exhibits 89 and 90 on the basis that they had not been properly authenticated has not been shown to be deficient performance. Further, because the same evidence was placed before the jury through the testimony of several witnesses and other exhibits, Boyd has not shown that he suffered any prejudice by the admission of the exhibits. This issue is without merit.

III. Counsel's Failure to Object to the State's Cross-Examination of Boyd Concerning Text Messages Purportedly between Boyd and Russell while Boyd was in Custody Awaiting Trial

¶22. In his defense, Boyd offered the testimony of Nathan Shelton. Shelton shared a cell with Boyd prior to trial and knew all the victims. Before he was incarcerated, Shelton was living with Russell and referred to her as his sister, although they are not biologically related. Shelton testified that Smith (also known as Lumpy), came to him and told him they had a guy coming to buy some weed and Smith asked Shelton to help him "jump him and rob him for his money." Shelton testified that he told Smith that he was not going to allow that to happen at his "place of living." Shelton would not directly answer questions regarding when he first told anyone about his conversation with Smith, but did admit that "he didn't tell this until [the week of trial]." The State's cross-examination of Shelton was an effort to show that

Shelton colluded with Boyd to come up with this recently created story concerning a planned robbery.

¶23. On cross-examination, Shelton admitted that he had given Russell's cell phone number to Boyd. Shelton testified that although cell phones are not allowed in jail, Boyd had access to a cell phone while they were incarcerated. Shelton denied knowing anything about any text messages from Boyd to Russell. Shelton also testified that the week before trial, the Sheriff's Department confiscated the cell phones from the inmates in the jail.

¶24. Later, during cross-examination of Boyd, the prosecution questioned him regarding the text messages which were received by Russell and were purportedly sent by Boyd. These messages were marked as State's Exhibits 117, 118, and 119 for identification only. Boyd admitted that he obtained Russell's cell phone number from Shelton. The State read each of the messages to Boyd and asked him if he sent the messages. After Boyd denied knowing of or sending the messages, the three exhibits were not offered or admitted into evidence. The content of these messages, if true, showed that Boyd was trying to convince Russell, one of the victims in this case, to testify in support his claim of self-defense. The content of the messages was consistent with Boyd's testimony on direct examination, but was inconsistent with the statement he gave to law enforcement the day after the shootings.

¶25. The issue is whether the State had a good faith basis for asking these questions of Boyd on cross-examination. This Court has addressed a similar issue in *Pipkins v. State*, 878 So. 2d 119 (Miss. Ct. App. 2004). In that case Pipkins and his co-defendant girlfriend, Debra Tyler, had been charged with possession of a controlled substance and with possession of

precursor chemicals with the intent to manufacture a controlled substance. During cross-examination, the State questioned Pipkins about whether he had telephoned Tyler the night before she was scheduled to testify in Pipkins' trial to "intimidate or otherwise improperly influence her testimony." *Id.* at 122 (¶7). Pipkins admitted to making a call to Tyler, but denied any effort to have her alter her testimony. The trial court overruled a timely objection by Pipkins' counsel and allowed the examination. After Pipkins' denial, the State made no other effort to prove the nature of the conversation. On appeal, Pipkins argued that just asking such questions was a violation of Mississippi Rule of Evidence 404(b). In response to Pipkins' claim, this Court reasoned:

> The State certainly suggested certain improper conduct on the part of Pipkins through its questioning, but Pipkins denied any such behavior at every opportunity. A question posed by an attorney participating in the trial is not evidence, even though it may give rise to an inference that such evidence exists.
>
> The actual issue does not involve the admissibility of evidence of this nature. The State was surprised by the nature of Tyler's testimony, which represented a significant departure from her earlier statements given to law enforcement. Under that circumstance, the State was entitled to explore the believability of her in-court testimony by presenting evidence by which the jury could better assess her credibility. One way to do so was to present evidence relating to any bias, prejudice, or interest of Tyler. M.R.E. 618. Evidence that the defendant had, through threats of suicide by Pipkins and related attempts by him to manipulate Tyler's testimony, would plainly have demonstrated potential bias on her part.
>
> The problem presented is, thus, not the nature of the examination, but whether the State had a legitimate basis to suggest that such attempts to influence Tyler's testimony actually occurred since Pipkins's own responses – beyond his admission to the phone conversation itself – offered no supporting evidence and the State did not follow up by calling other witnesses to show the basis for the inquiries. We deal, therefore, not with an evidentiary question but a question of possible prosecutorial misconduct for asking inflammatory

questions without a good-faith basis in fact for doing so.

> We decline to reverse Pipkins's conviction on the ground of prosecutorial misconduct. We do not think that the questioning, followed by Pipkins's firm denials of any improper activity, was so highly inflammatory and prejudicial to the defense as to affect the fundamental fairness of the trial. While we are satisfied that it would have been preferable for the trial court to have obtained some assurance that there was a credible foundation for the State's inquiry, we do not find a reasonable basis to conclude that the State simply manufactured the allegations out of thin air for the sinister purpose of prejudicing the defendant in the jurors' eyes with false accusations.

Id. at (¶¶8-11).

¶26. In the case at bar, Boyd was asked about the text messages during cross-examination. Just as in *Pipkin*s, Boyd's testimony during direct examination was a surprise due to its conflict with the prior statement Boyd had given to law enforcement the day after the shootings. The circuit court inquired as to the source of the State's information and was advised that Russell had given the text messages to the Sheriff's Department the week before the trial. The State advised the circuit court that defense counsel had been given copies of the messages.

¶27. Shelton's testimony that he had given Russell's cell phone number to Boyd and that Boyd had access to a cell phone in jail gave credibility to the possibility that the messages were, in fact, from Boyd. The fact that the content of the messages, as noted above, was consistent with Boyd's testimony on direct examination, but inconsistent with his prior statement to law enforcement, was further evidence that the messages came from Boyd. It fully appeared to the State that the messages were an effort to change Russell's testimony at trial to support Boyd's changed version of the events of that night. Like *Pipkins*, the State

had a legitimate basis to question Boyd concerning an attempt to influence Russell to adopt his version of events. Because Boyd denied sending the text messages, we find that there was no prosecutorial misconduct by asking the questions. Further, because any objection to the State's asking Boyd whether he sent the messages would have been properly overruled, Boyd cannot show ineffective assistance of counsel in this regard. This issue is without merit.

IV. Counsel's Failure to Object to Improper Comments by the Prosecutor during the Closing Argument

¶28. During closing arguments, Boyd contends that his trial counsel was ineffective by failing to object when the prosecution made the following references to the text messages discussed above:

> The defendant in this case has been trying to paint the perfect picture of him being innocent from the beginning of this thing. ***You heard that in the message yesterday that he denied. Help me paint the perfect picture of me being innocent.***
>
> . . . .
>
> I want to talk just for a second about Too Tall, about Nathan Shelton. . . . He remembered that he knew something about this case this week. We also found out that he had given the defendant Paula's number, and he also told you that late last week they raided a cell and got some cell phones out. You remember him saying that. ***And then we find out about these messages that the defendant denies sending.***
>
> ***So the message goes to Paula***, and then there's a raid in the jail for cell phones. ***Pretty good indication that turns out Paula didn't want to be contacted by the defendant***.

(Emphasis added).

¶29. Boyd contends that his counsel was ineffective by failing to object to the improper argument by the prosecutor commenting on facts that were not in evidence. In *Hearns v.*

State, 313 So. 3d 533, 537 (¶10) (Miss. Ct. App. 2021), the Court held:

> An improper closing argument by the State will require a new trial if "the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Wilson v. State*, 194 So. 3d 855, 864 (¶30) (Miss. 2016) (quoting *Galloway v. State*, 122 So. 3d 614, 643 (¶72) (Miss. 2013)). Prosecutors "are allowed a wide latitude in arguing their cases to the jury" but may not make arguments that "are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." *Sheppard v. State*, 777 So. 2d 659, 661 (¶7) (Miss. 2000). "The prosecutor may comment upon any facts introduced into evidence, and he may draw . . . deductions and inferences that seem proper to him from the facts." *Wilson*, 194 So. 3d at 864 (¶30) (quoting *Galloway*, 122 So. 3d at 643 (¶72)). **But the prosecutor may not state facts that are not in evidence**. *Id*. (emphasis added).

It is clear that the prosecutor did make improper comments during his closing argument. The prosecutor should not have referenced the fact that Boyd denied sending messages that were not admitted into evidence and should not have referenced the content of those messages. In fact, there is no proof that Russell received the messages. Those portions of the prosecutor's closing argument in italics and bolded above are facts that were not in evidence; however, the remaining portions of the argument are based upon Shelton's testimony and inferences from Boyd's two versions of the events that were in evidence. Those portions are not improper.

¶ 30. Had Boyd's trial counsel raised an objection to the comments on facts not in evidence, the trial court could have sustained the objection and, upon the request of Boyd's counsel, could have instructed the jury to disregard such comments. Boyd's counsel was aware that the jury had already been instructed by the court, in part: "*Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but*

they are not evidence. Any argument, statement or remark having no basis in the evidence should be disregarded by you." (Emphasis added). Accordingly, Boyd's trial counsel had to make a choice: (1) voice an objection and risk drawing more attention to an improper comment, or (2) rely upon the jury following the trial court's instruction to disregard such argument because it had no basis in the evidence.[3]

¶31. Whether to make the objection and ask the court to instruct the jury to disregard these comments was clearly a matter of trial strategy. In *Curry v. State*, 202 So. 3d 294, 301 (¶24) (Miss. Ct. App. 2016), this Court stated:

> We presume that counsel's decision not to request a limiting instruction was within the ambit of trial strategy. *See, e.g.*, *Herrington v. State*, 102 So. 3d 1241, 1246 (¶18) (Miss. Ct. App. 2012). This presumption is appropriate given that, as discussed above, such an instruction has the potential to do the defendant more harm than good. *See id*. We also generally assume that counsel's failure to object during closing argument reflects trial strategy, not ineffective assistance. *See, e.g.*, *White v. State*, 847 So. 2d 886, 891 (¶19) (Miss. Ct. App. 2002). Moreover, for the reasons already discussed in the preceding section, nothing in the State's closing argument was so prejudicial and "serious as to deprive [Curry] of a fair trial." *Strickland*, 466 U.S. at 687. Accordingly, Curry's ineffective assistance claim is without merit.

We must answer the question as to whether Boyd's trial counsel's strategic decision not to raise the objection and seek an instruction to disregard "was so prejudicial and serious to deprive [Boyd] of a fair trial." In *Cole v. State*, 666 So. 2d 767, 775 (Miss. 1995), the supreme court instructed as to how we must view counsel's performance:

> The determination of whether counsel's performance was both deficient and

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[3] In *Young v. State*, 236 So. 3d 49, 57 (¶38) (Miss. 2017), the court concluded that the jury is presumed to follow instructions from the trial court; to presume otherwise would render the jury system inoperable. (Citing *Pitchford v. State*, 45 So. 3d 216, 240 (¶96) (Miss. 2010)).

> prejudicial must be determined from the "totality of the circumstances." *Frierson v. State*, 606 So. 2d 604, 608 (Miss. 1992). The target of appellate scrutiny in evaluating the deficiency and prejudice prongs of *Strickland* is counsel's "over-all" performance. *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992).

The State's challenge to Boyd's credibility was based primarily upon Boyd's trial testimony being substantially different from his statement to law enforcement the day after the shootings. The improper statements concerning the text messages were a minor portion of the State's argument. Because the jury was instructed by the trial court to disregard any portion of the argument that had no basis in the evidence, we find that trial counsel's strategic decision not to object was not so prejudicial as to deprive Boyd of a fair trial. This issue is without merit.

CONCLUSION

¶32. In reviewing Boyd's trial counsel's performance under the totality of the circumstances, we do not find that trial counsel's performance was deficient, nor did it prejudice Boyd's defense. As a result, Boyd's convictions and sentences are affirmed.

¶33. **AFFIRMED.**

BARNES, C.J., CARLTON AND WILSON, P.JJ., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE AND SMITH, JJ., CONCUR. McCARTY, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION.