

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JEROME KENNEDY,

Defendant-Appellant.

UNPUBLISHED

October 19, 2006

No. 252104

Washtenaw Circuit Court

LC No. 02-002185-FH

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendant David Jerome Kennedy appeals as of right his July 21, 2003 jury convictions of second-degree murder,¹ four counts of intentionally discharging a firearm at or in a dwelling,² two counts of carrying a concealed weapon,³ two counts felonious assault,⁴ and one count of possession of a firearm during the commission of a felony (felony-firearm).⁵ Following Kennedy's jury conviction, the trial court sentenced him to two years' imprisonment for felony-firearm followed by concurrent sentences of 35 to 60 years' imprisonment for second-degree murder and 36 to 90 months' imprisonment on each of the remaining convictions. This case arises out of the strangulation death of John Chambers. We affirm.

I. Basic Facts And Procedural History

On the evening of October 25, 2002, Kennedy went to a party at Chambers' home in Ypsilanti. Shortly after Kennedy entered the home, he and Chambers began to argue and exchange profanities because Kennedy had been "looking in [Chamber's] stuff." Chambers threatened to kill Kennedy, asked Kennedy to leave, and began escorting him towards to door. Kennedy grabbed Chambers, wrestled him to the ground and, pulling off his own belt, wrapped it

¹ MCL 750.317.

² MCL 750.234b.

³ MCL 750.227.

⁴ MCL 750.82.

⁵ MCL 750.227b.

around Chambers' neck. Emmet Jones broke up the altercation and "put [Kennedy] out" of the house. Jones helped Chambers to his feet and then gave Kennedy a ride to some nearby townhouses. Twenty to thirty minutes later, Kennedy returned to Chambers' home. Finding Chambers asleep on a couch, Kennedy pulled a pistol out of his pants pocket, shot four times into the wall above Chambers' head, and left. Sometime later, Kennedy again returned to Chambers' home. Pamela Smith saw Chambers lying on or near an overturned couch. Although she did not witness it, Smith believed that Kennedy overturned the couch while Chambers was on it.

Emmet Jones returned to Chambers' home around midnight, saw Smith through the window, and entered the house to speak to her. Upon entering the living room, Jones saw Kennedy put a gun to Chambers' head. Jones asked Kennedy if he had lost his mind and demanded to know what was going on. Kennedy ordered Jones to leave. Smith tried to "ease out" with Jones, but Kennedy commanded her to stay. Smith complied but sat down in the kitchen rather than remain in the living room. Smith returned to the living room, and Kennedy ordered her to hand him an extension cord, which Kennedy then used to truss Chambers, tying together Chambers' ankles and hands behind his back and then tying the cord around his neck. Chambers began making choking noises. Smith pleaded that the extension cord was too tight. Chambers twice managed to free himself of the extension cord, which enraged Kennedy who then fired his pistol into the couch. Chambers started gagging and trying to regain his breath; however, the rope was too tight and he eventually stopped moving. Smith panicked and begged Kennedy to let her go. Smith admitted that she was high on crack cocaine at the time, but insisted that she "came to [her] senses" on seeing the incident. Kennedy then left Chambers' home and walked across the street. Glen Richison testified that at approximately 2:00 a.m. on October 26, Kennedy knocked on his apartment door. Richison let Kennedy in and asked him what he wanted so early in the morning. Kennedy said, "I killed Johnny."

After his conviction, Kennedy's first appellate counsel moved for a new trial and/or resentencing, challenging the sufficiency of the evidence, the great weight of the evidence, and the effectiveness of trial counsel and alleging various instructional and prosecutorial errors. After a hearing, the trial court denied Kennedy's motion. Appellate counsel subsequently moved to withdraw, and this Court suspended the briefing schedule to permit the trial court to appoint new appellate counsel.⁶ After new appellate counsel was appointed, this Court issued a briefing schedule that ran from the notice of filing a transcript from Smith's case, the transcript of the hearing setting Smith's bond.⁷ Kennedy's first appellate counsel had not ordered this transcript.

Kennedy's new appellate counsel filed a 50-page motion for new trial and for relief from judgment in the trial court, which the trial court struck as the motion was in excess of the 20-page limit. Further, as it was Kennedy's second motion for new trial, the trial court limited any

⁶ *People v Kennedy*, unpublished order of the Court of Appeals, entered February 11, 2005 (Docket No. 252104).

⁷ *People v Kennedy*, unpublished order of the Court of Appeals, entered May 25, 2005 (Docket No. 252104).

new argument filed by Kennedy to the information found in the Smith transcript. Kennedy apparently thereafter filed a conforming motion. Kennedy also filed a “Motion to Allow *Ginther*⁸ Hearing and to Preserve Record with Evidence to Support Claims of Denial of Due process by Withholding of Discovery, and Prosecutorial Misconduct and to Preserve Record on Other Claims of Error, Including Denial of Witness Competency Hearing re Pamela Smith,” as well as other post-judgment motions.

After hearing arguments on the motions, the trial court issued a lengthy bench ruling. In pertinent part, the trial court ruled that nothing in the Smith transcript caused it to reconsider its decision to deny Kennedy a new trial. The trial court denied Kennedy a *Ginther* hearing because the trial court proceedings “do not need to be expanded as they are complete.” The trial court opined that “trial counsel’s proofs and arguments were matters of trial strategy and therefore presumptively sound.” The trial court held that there was “no basis” for Kennedy’s ineffective assistance of counsel claim and “no basis for the court taking testimony at an evidentiary hearing regarding Pamela Smith.” The trial court indicated that it had been considering sanctioning defense counsel for his “motion by ambush” style but decided to leave the determination for this Court. The trial court then issued an order denying Kennedy’s motion for new trial and his motion for a *Ginther* hearing (as well as Kennedy’s other post-judgment motions) for “the reasons placed on the record.”

Kennedy then requested that this Court remand the matter to a different trial judge for a *Ginther* hearing. Kennedy also moved to hold his appeal in abeyance (and extend the time for filing his appellant’s brief) until this Court decided his motion to remand. This Court denied both motions.⁹ Several weeks before oral arguments before this panel, Kennedy again moved for remand. This panel denied the motion.¹⁰

II. Denial Of Right To Appeal And Ineffective Assistance Of Counsel

Kennedy argues that a remand is necessary to determine whether the trial court denied his right to appeal by denying him: (1) access to trial exhibits; (2) access to the complete record of trial; (3) a *Ginther* hearing; (4) a hearing on leniency; and (5) a hearing on newly discovered evidence. Kennedy also argues remand is necessary because he was denied a fair trial due to ineffective assistance of counsel.

A. Abandonment

Kennedy is essentially seeking reconsideration of this Court’s previous denials of his motions for remand, but he fails to provide any rationale whatsoever warranting our

⁸ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

⁹ *People v Kennedy*, unpublished order of the Court of Appeals, entered December 14, 2005 (Docket No. 252104); *People v Kennedy*, unpublished order of the Court of Appeals, entered December 29, 2005 (Docket No. 252104).

¹⁰ *People v Kennedy*, unpublished order of the Court of Appeals, entered September 1, 2006 (Docket No. 252104).

reconsideration of that motion. Accordingly, Kennedy's failure to properly address the merits of his request constitutes abandonment of this issue.¹¹

B. Sound Trial Strategy

Kennedy argues that he was denied a fair trial due to ineffective assistance of counsel and this case should be remanded to allow preservations of the issues "on a full record for appeal." Kennedy identifies nine claims of ineffective assistance to be "explored on remand" all of which involve failures of trial counsel to take action related to evidence and testimony involving Smith. He discusses, without listing, one claim regarding the medical examiner's testimony involving cause of death.

All of Kennedy's claims regarding ineffective assistance of counsel involve decisions regarding which evidence to present and whether to call or question witnesses. These types of decisions are presumed to be sound trial strategy.¹² We will not use the benefit of hindsight to second-guess those decisions.¹³ Failure to call witnesses, including experts, would only constitute ineffective assistance of counsel if Kennedy were deprived of a substantial defense.¹⁴ The record shows trial counsel attacked Smith's credibility and raised the issues of leniency, mental health issues, and drug use during cross-examination and again during closing arguments. Trial counsel also attacked the medical examiner's credibility during cross-examination and closing arguments. Because Kennedy already raised these issues in his defense, his contention is without merit.

To the extent that Kennedy argues that counsel was ineffective for not arguing that various other witnesses were suspects and that someone else could have murdered the victim, these arguments are without merit and without evidence in the record. The fact that trial counsel did not have a fingernail tested for DNA was not ineffective assistance of counsel, because, as noted above, arguing someone else murdered the victim would have been inconsistent with the trial strategy of arguing he died from a heart attack. Accordingly, we conclude that trial counsel did not render ineffective assistance of counsel.

III. Cause Of Death And Corpus Delicti

A. Standard Of Review

Kennedy asserts that the prosecution failed to offer sufficient proofs of cause of death by criminal agency beyond a reasonable doubt and that the prosecution relied on Kennedy's alleged confession to prove homicide in violation of the *corpus delicti* rule. When considering an insufficiency of the evidence claim, we look at "whether the evidence, viewed in the light most

¹¹ *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

¹² *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

¹³ *Id.*

¹⁴ *Id.*

favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.”¹⁵ We “draw all reasonable inferences and make credibility choices in support of the jury verdict,” as the standard of review is deferential.¹⁶ “The scope of review is the same whether the evidence is direct or circumstantial.”¹⁷

B. Proofs Of Criminal Agency

Kennedy argues that the proofs were insufficient to show murder. Rather, he argues, the proofs showed it was equally likely the victim had died of a heart attack or autoerotic asphyxiation. Prosecution expert Dr. John Scott Somerset testified that, in his medical opinion, Chambers’ death was a homicide–asphyxia by strangulation. Having examined Chambers’ body, Dr. Somerset observed petechia in both of the victim’s eyes¹⁸ and furrows on the victim’s right ankle and neck. He found hemorrhage on the strap muscles of the neck that corresponded with the strangulation and ligature marks he saw on the neck. He determined the cause of death was homicide and would have “ruled him . . . a strangulation without hesitation right that day,” but “pended” his investigation awaiting further information because of the “very unusual” story he was told about Chambers being choked until he passed out and then being fine. On receipt of photographs that showed furrows in the victim’s neck that were not present at the time of the autopsy, Dr. Somerset was convinced that Chambers’ death was homicide.

The prosecution “is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility.”¹⁹ It is irrelevant whether the victim *could* have died from a heart attack or as the result of a strange sexual practice. Dr. Somerset testified that “there was no evidence of other causes of death.” Viewing the evidence in the light most favorable to the prosecution, there were sufficient proofs to show criminal agency beyond a reasonable doubt.

C. Corpus Delicti

“[T]he corpus delicti of homicide is established when the prosecutor establishes by a preponderance of direct or circumstantial evidence that the victim is dead and that death was the result of some criminal agency.”²⁰ A defendant’s confession is not admissible unless direct or

¹⁵ *People v Nowak*, 462 Mich 392, 399; 614 NW2d 78 (2000).

¹⁶ *Id.* at 400.

¹⁷ *Id.*

¹⁸ Dr. Somerset testified that he erred on the side of caution and only declared the petechia in the right eye in his report.

¹⁹ *Nowak*, *supra* at 400.

²⁰ *People v Modelski*, 164 Mich App 337, 342; 416 NW2d 708 (1987).

circumstantial evidence establishes both of those elements.²¹ Once established, however, appropriate extrajudicial confessions may be admitted.²²

Chambers was found naked, face down, and dead, thus fulfilling the first prong. Multiple witnesses testified regarding marks of violence found on the Chambers' body. Testimony regarding finding of the body, its physical appearance, and any marks of violence on the body, is sufficient to show *corpus delicti*.²³ Thus, the testimony went well beyond what was required. Further, "[w]hen a defendant's statement is not simply an admission, but also falls within another exception to the hearsay rule, which gives an additional indication of truth, the statement is admissible to prove the corpus delicti."²⁴ Admissible statements to prove corpus delicti include excited utterances and statements made "roughly contemporaneously with the crime even if shortly after."²⁵ Kennedy's admission to Richison that he killed Chambers was either an excited utterance or a statement made contemporaneously with the murder, making it properly admissible. Accordingly, we conclude that there were sufficient proofs of criminal agency to show homicide as the cause of death, and that the prosecution satisfied its burden to show *corpus delicti* before Kennedy's admission was admitted into evidence.

IV. Expert Opinion

A. Waiver

Kennedy's trial counsel stated on the record that he "le[ft] it to the court" to decide if there were any objections to Dr. Somerset's qualification as an expert. Having turned the decision over to the trial court, Kennedy waived any objections to Dr. Somerset's qualification. "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."²⁶ Accordingly, we conclude that the trial court did not err in admitting Dr. Somerset's expert testimony.

B. Qualifications

Irrespective of defense counsel's waiver of this issue, we reject Kennedy's argument that Dr. Somerset withheld evidence of both his lack of qualifications and his opinions regarding Chamber's cause of death, and that under *Gilbert v DaimlerChrysler Corp.*,²⁷ Dr. Somerset's opinions at trial should have been limited to cause of death.

²¹ *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996).

²² *Id.*

²³ *People v Jackzo*, 206 Mich 183, 190; 172 NW 557 (1919).

²⁴ *People v Randall*, 42 Mich App 187, 191; 201 NW2d 292 (1972).

²⁵ *Id.*

²⁶ *People v Carter*, 462 Mich 206, 215; 612 NW2d 114 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

²⁷ *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749; 685 NW2d 391 (2004).

Expert testimony is admissible under MRE 702 if the witness is an expert, there are facts in evidence that require examination by a competent expert, and the expert has knowledge that belongs more to an expert than an ordinary person.²⁸ Dr. Somerset testified that he was currently the Deputy Medical Examiner for Washtenaw and Livingston counties; he is a licensed physician and has a doctorate in human genetics; he did a pathology residency and a forensic pathology fellowship; he was previously a medical examiner for Wayne County; he is a member of the American Academy of Forensic Scientists; he is board certified in forensic medicine; he has been qualified as an expert in Michigan, Texas, and federal courts; he performed over 2,000 autopsies; and he did the autopsy on the victim in this case. During *voir dire*, Kennedy's trial counsel tested Dr. Somerset's qualifications. Dr. Somerset indicated that he was not board certified in forensic pathology because he did not pass the general pathology portion of the exam but that general pathologists went to forensic pathologists to determine cause of death. Dr. Somerset testified that being board certified would not have made any difference in his pay as Medical Examiner in either Wayne County or in his present job.

Under MRE 702, testimony will be admitted if it is based on sufficient facts or data, is a product created from reliable principles and methods, and the principles and methods have been reliably applied by the witness to the facts of the case.²⁹ Given Dr. Somerset's training and experience, it was clear that his knowledge of forensic pathology and forensic medicine was based on reliable forensic principles, which he applied to the facts in this case using the evidence from the autopsy and crime scene photographs, to determine that the victim was strangled. Therefore, Dr. Somerset's testimony satisfied MRE 702, and we find no plain error in the trial court admission of the expert testimony.

Kennedy also claims that Dr. Somerset denied discovery requests by not bringing a resume to the trial. Dr. Somerset testified that his understanding was that defense counsel would request a copy from the prosecution. Dr. Somerset admitted that he had not provided a copy of his curriculum vitae (CV) to the prosecution, but trial counsel did not object further. Kennedy argues that by not having the resume or CV, he was denied discovery of the expert's lack of qualifications and opinions and, therefore, was prejudiced and entitled to a new trial. Specifically, he indicates that without the CV his trial counsel was unable to explore whether Dr. Somerset left his job at Wayne County, or was fired for either not passing the boards or for incompetence. This claim is disingenuous. The record reflects that trial counsel specifically asked Dr. Somerset whether he had been forced out of his job in Wayne County, to which Dr. Somerset replied "No." Dr. Somerset had already testified during direct examination that he had left Wayne County because he was offered "a better job." Dr. Somerset further testified in response to defense counsel's questioning that board certification was not required to perform

²⁸ *Id.*

²⁹ See *Gilbert, supra* at 782. This writer does not understand Kennedy's argument that the trial judge erred in applying "the old *Davis v. Frye* test instead of that new *Craig/Daubert* test," (Reply Brief, p 1) because our Supreme Court held in *Gilbert* that "the court's gatekeeper role is the same under *Davis-Frye* and *Daubert*." *Gilbert, supra* at 782.

that job. Therefore, defense counsel has already questioned Dr. Somerset regarding his leaving the Wayne County job.

Kennedy asserts that “Dr. Somerset was not impeached to show how lack of qualifications affected his opinions on cause of death.” There are two problems with this assertion. First, it assumes that Dr. Somerset had a lack of qualifications. Second, it assumes defense counsel did not attempt to impeach Dr. Somerset. Kennedy’s trial counsel used *voir dire* to argue that Dr. Somerset was unqualified, addressing the very issues appellate counsel now raises. Thus, defense counsel clearly had the opportunity to impeach Dr. Somerset and attempted to do so. Accordingly, we conclude that there was no plain error in the trial court’s use of its discretion to admit Dr. Somerset’s expert testimony.

V. Witness Competency

A. Standard Of Review

Kennedy argues that Pamela Smith was not competent to testify, and the trial court erred in allowing her testimony. We review for an abuse of discretion a trial court’s decision regarding a witness’ competency to testify.³⁰ All reasonable inferences and credibility determinations must be drawn in favor of the jury verdict.³¹ Because Kennedy did not preserve the issue of Smith’s competency with a timely objection, we cannot grant relief absent a showing of plain error affecting Kennedy’s substantial rights.³²

B. Presumption Of Competency

Every person is presumed competent to testify unless the trial court finds after questioning of that person that he or she does not have “sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably.”³³ “[T]he test of competency of a witness does not focus on whether a witness is able to tell right from wrong but, rather, on whether a witness has the capacity and sense of obligation to testify truthfully and understandably.”³⁴ Although a trial court has a duty to determine the competency of a witness before submittal of that testimony to the jury, competency may be determined if the witness can give lucid, connected testimony, with the jury determining the weight of that evidence.³⁵ It is clear from the record that Smith understood the questions put to her and made direct answers to

³⁰ *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

³¹ *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003).

³² *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

³³ MRE 601.

³⁴ *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998), quoting *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988).

³⁵ *People v Patton*, 66 Mich App 118, 120; 238 NW2d 545 (1975), citing *Mead v Harris*, 101 Mich 585, 588; 60 NW 284 (1894).

them. Therefore, we conclude there was no plain error in the trial court's conclusion that Smith was competent to testify or in its admission of Smith's testimony.

VI. Bench Warrant Hearing

A. Standard Of Review

Kennedy argues that the trial court erred in not allowing him to be present at Smith's bench warrant hearing, which Kennedy claims is relevant to Smith's competency and incentive to change her testimony. We review constitutional issues *de novo*.³⁶ We review a determination of whether a defendant is entitled to transcript requests from another person's trial for abuse of discretion.³⁷

B. Required Showing Of Value

The bench warrant hearing at issue was held after Smith testified in Kennedy's trial. Kennedy's trial was recessed for the day, and a hearing was called to address Smith's outstanding bench warrant. Under MCR 7.210, "the record consists of . . . the transcript of any testimony or other proceedings *in the case appealed* (emphasis added)." The hearing at issue involved an unrelated crime by a different defendant in a completely separate case and, therefore, is neither testimony nor a proceeding in this case.

A defendant is entitled to trial transcripts requested from a codefendant's trial, or transcripts from a trial of initial suspects in the same crime, if the defendant can show that the transcript will be valuable to him.³⁸ In *People v Brown*, this Court held that the trial court did not err in denying a transcript because the defendant did not show how the transcript "would have assisted in trial preparation or impeaching witnesses."³⁹ Kennedy argues that Smith's competency was an issue in the bench warrant hearing. Assuming that this is true, Kennedy fails to show that being provided with the transcript would be "valuable." Kennedy was not precluded from discussing the outstanding warrant or the witness's previous jail time, and his defense counsel had already questioned Smith about taking Haldol, being a schizophrenic, any history of mental illness, and whether she had received leniency from the police in exchange for her testimony. Therefore, we conclude that the content of Smith's bench warrant hearing is not applicable to this case and that the trial court did not abuse its discretion in determining that it was not part of the record in this case.

³⁶ *People v McRae*, 469 Mich 704, 720; 678 NW2d 425 (2004).

³⁷ *People v Cross*, 30 Mich App 326, 336; 186 NW2d 398 (1971). See also *People v Brown*, 126 Mich App 763, 765-769; 337 NW2d 915 (1983) (discussing *People v Kelley*, 49 Mich App 720; 212 NW2d 750 [1973]).

³⁸ *Brown*, *supra* at 765-769; *Kelley*, *supra* at 726-728.

³⁹ *Brown*, *supra* at 769.

VII. Prosecutor's Failure To Disclose Leniency

A. Standard Of Review

Kennedy argues that the prosecution violated its duty to reveal that Smith had been diagnosed as a schizophrenic and that she was shown leniency in exchange for her testimony. Claims of prosecutorial misconduct are decided on a case-by-case basis,⁴⁰ and we generally review them de novo.⁴¹ “Unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice,” appellate review is precluded because Kennedy did not object to the alleged misconduct at the time of trial.⁴²

B. Disclosure To Jury

Kennedy's trial counsel explicitly asked Smith about any diagnosis of schizophrenia and her use of Haldol. Smith testified that she had not been diagnosed with schizophrenia, but that she had been on Haldol for “bad nerves.” Kennedy was free to impeach Smith and question her credibility, which he did. Kennedy asserts that “the prosecution knew (or should have known) that Ms. Smith had admitted before trial to her probation officer that she had been diagnosed as a schizophrenic,” but provides no proof for this assertion. As for alleged leniency, both Smith and Detective Robert Peto testified that Smith was not promised anything in exchange for her testimony. Detective Peto testified that he told Smith he was not going to arrest her and advised her that there was an outstanding warrant; he explained that he had not arrested Smith nor had his department brought her to the courthouse to testify because he “would rather her come in on her own . . . to build her credibility and to show that she's being truthful.” Therefore, any leniency that Detective Peto may have exercised was disclosed to the jury. Thus, we conclude Kennedy has failed to establish any plain error affecting his substantial rights.

VIII. Threat Testimony

A. Standard Of Review

Kennedy argues that the trial court erred in allowing Smith to testify about alleged threats made against her because it was inadmissible hearsay that improperly bolstered her credibility. He also argues that the testimony violated his right to confront the people who allegedly made the statements. The admission of evidence is within the trial court's discretion and is not disturbed absent an abuse of discretion.⁴³ “However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or

⁴⁰ *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

⁴¹ *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

⁴² *Noble*, *supra* at 660.

⁴³ *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

statute precludes admissibility of the evidence,” which we review de novo.⁴⁴ Admission of evidence that is inadmissible as a matter of law is an abuse of discretion.⁴⁵

B. State Of Mind

Even though a defendant’s threats against a witness are generally admissible to demonstrate consciousness of guilt,⁴⁶ this threat testimony was not admitted to establish that Kennedy attempted to threaten Smith, but rather to explain why Smith gave prior inconsistent statements. Because Smith’s prior inconsistent statements are relevant to impeach her credibility, inquiry into why she made the prior statement is an appropriate means of testing her credibility.⁴⁷ The information was used to explain inconsistent witness statements and testimony, such that the probative value of Smith’s testimony regarding the threats was not outweighed by the danger of unfair prejudice.⁴⁸

Kennedy’s relies on *People v Spencer*,⁴⁹ but the facts are not analogous. In *Spencer*, a witness had testified inconsistently at trial with respect to three letters he had written that exculpated the defendant.⁵⁰ The prosecution sought to introduce into evidence threatening letters, allegedly sent by the defendant to a witness while they were both in jail, to establish state of mind.⁵¹ The trial court ruled that the threatening letters were irrelevant to the witness’ state of mind at the time he wrote the exculpatory letters because they were written over a month before the threatening letters were received.⁵² Here, Smith testified that the threats occurred before she gave her testimony at the preliminary hearing. Therefore, unlike in *Spencer*, the threats were directly relevant to her state of mind when she gave her testimony at the preliminary hearing.

Even assuming that it was error to admit the threat testimony, the trial court issued a limiting instruction at the request of defense counsel that the testimony was not being introduced for the truth of the threats, but for Smith’s state of mind. Because juries are presumed to follow their instructions,⁵³ the trial court’s limiting instruction cured any prejudice that may have resulted from Smith’s threat testimony.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996).

⁴⁷ *Id.* at 735-736.

⁴⁸ MRE 403.

⁴⁹ *People v Spencer*, 130 Mich App 527; 343 NW2d 607 (1983).

⁵⁰ *Id.* at 537-538.

⁵¹ *Id.*

⁵² *Id.* at 538.

⁵³ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Kennedy argues in his issue statement that the prosecutor withheld exculpatory evidence about Smith's delay in reporting the alleged threats and lacked proof that any such threats were ever made, but he does not argue this issue within his brief. His failure to properly address the merits of his request constitutes abandonment of this issue.⁵⁴ Kennedy similarly also does not develop his confrontation argument, abandoning the issue.⁵⁵ Kennedy claims ineffective assistance of counsel because his trial counsel did not request a mistrial based on the admission of the threat testimony. But, because the admission of the testimony was not error, counsel was not ineffective for failing to raise an objection or motion that would have been futile.⁵⁶ Accordingly, we conclude that the trial court did not err in admitting the threat testimony to show Smith's state of mind and any error that may have occurred was cured by the trial court's limiting instruction.

IX. Addict-Informer Instruction

A. Standard Of Review

Kennedy argues that the trial court erred in failing to instruct the jury that Smith was an addict-informer. We review an alleged failure to give a preliminary instruction, when the instruction is not mandated by statute, for an abuse of discretion.⁵⁷

B. Sole Evidence Requirement

“An instruction concerning special scrutiny of the testimony of addict-informants should be given upon request, where the testimony of the informant is the only evidence linking the defendant to the offense.”⁵⁸ The defense did request the instruction, but the trial court denied the motion based on this Court's holding in *People v Griffin*. In *Griffin*, there was additional testimony that corroborated the informant's account so that “the testimony of the informant was not the ‘only evidence linking the defendant to the offense.’”⁵⁹ Similarly, Smith's testimony was not the sole evidence linking Kennedy to the victim's death. Other witnesses placed Kennedy at the scene during the time of the murder, Richison testified that Kennedy admitted to killing Chambers, and physical evidence corroborated Smith's testimony. As in *People v Griffin*, the jury was aware of Smith's drug use, as she admitted to taking drugs and being high during the incident.

⁵⁴ *Harris, supra* at 50.

⁵⁵ *Id.*

⁵⁶ *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

⁵⁷ See *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991); *Coles v Galloway*, 7 Mich App 93, 102; 151 NW2d 229 (1967).

⁵⁸ *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999), quoting *People v Smith*, 82 Mich App 132, 133-134; 266 NW2d 476 (1978).

⁵⁹ *People v Griffin, supra* at 40, quoting *Smith, supra* at 134.

Kennedy argues that defense counsel was ineffective for not requesting a jury instruction regarding Smith's reliability (separate and apart from the addict-informer instruction), but he fails to give any legal authority in support of this position. This constitutes abandonment of the issue.⁶⁰ Therefore, we conclude that the trial court did not abuse its discretion in failing to give the jury an addict-informer instruction.

X. Voluntary Manslaughter Instruction

A. Standard Of Review

Kennedy asserts that the trial court failed to give a voluntary manslaughter instruction, which, he claims, the trial court was required to do so because it was a mandatory-cognate lesser-included offense of the second-degree murder charge. Jury instructions involving questions of law are reviewed *de novo*.⁶¹ “[A] trial court’s determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.”⁶²

B. Wavier

A voluntary manslaughter instruction was not required because “MCL 768.32(1) only permits instructions on necessarily included lesser offenses, not cognate lesser offenses.”⁶³ Moreover, Kennedy’s trial counsel specifically rejected such an instruction, arguing that the evidence was inconsistent with that charge. Rejection of the instruction constitutes waiver,⁶⁴ and waiver extinguishes any claim of error.⁶⁵ In *United States v Griffin*, cited with approval by the Michigan Supreme Court, the Seventh Circuit held that the defendant waived any objection to a jury instruction because his counsel affirmatively approved the instruction.⁶⁶ Here, trial counsel not only specifically requested the removal of the voluntary manslaughter instruction, but later indicated satisfaction with the jury instructions. Thus, trial counsel’s actions resulted in wavier not once, but twice. Accordingly, we conclude that the trial court did not err by not instructing the jury on voluntary manslaughter.

⁶⁰ *Harris, supra* at 50.

⁶¹ *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

⁶² *Id.* at 113, quoting *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

⁶³ *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

⁶⁴ *Carines, supra* at 762 n 7.

⁶⁵ *Carter, supra* at 215, quoting *United States v Griffin, supra* at 924.

⁶⁶ *Griffin, supra* at 923-924.

XI. Prosecutor's Improper Vouching For Witnesses

A. Standard Of Review

Kennedy asserts that the prosecutor improperly vouched for witnesses, expressed personal beliefs, and denigrated defense counsel during closing arguments. Claims of prosecutorial misconduct are decided on a case-by-case basis⁶⁷ and we generally review such claims de novo.⁶⁸ We examine the applicable sections of the record and use context to evaluate the prosecutor's remarks.⁶⁹ "Unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice," appellate review is precluded because Kennedy did not object at the time of trial.⁷⁰

B. Witness Credibility

The prosecutor gave several statements regarding Pamela Smith's credibility, including that Smith "did the right thing" by coming forward to testify. However, examined in context, this was clearly an attempt to deal with Smith's credibility issue. Furthermore, the trial court instructed the jurors that they were the sole judges of witness credibility. That instruction cured any prejudice.⁷¹

The prosecutor also stated that witness Tyrone Benon was "pretty unclear about the timetable." Where a jury is faced with a credibility question, the prosecutor is free to argue a witness' credibility from the evidence and need not "state inferences and conclusions in the blandest possible terms."⁷² Benon admitted he had been drinking since early in the morning on the date of Chamber's death and that he had been taking Vicodin and Tylenol-4 at the time. His testimony at trial was inconsistent with prior statements he made to the police. Thus, the prosecutor's argument was not improper.

C. Doctrine Of Fair Response

Kennedy also argues that "the prosecutor denigrated the defense by saying defense counsel was trying to confuse the jury." It is clear from the record that the prosecution was responding to comments made by defense counsel, and thus the comments fall squarely under the doctrine of fair response.⁷³ Therefore, we conclude that the prosecution's statements were proper and did not denigrate defense counsel.

⁶⁷ *Noble, supra* at 660.

⁶⁸ *Pfaffle, supra* at 288.

⁶⁹ *Noble, supra* at 660.

⁷⁰ *Id.*

⁷¹ *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

⁷² *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

⁷³ *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003).

XII. Sentencing Errors

Although Kennedy's statement of questions presented includes errors at sentencing, the argument section of Kennedy's brief does not mention sentencing at all. Accordingly, Kennedy has abandoned the issue.⁷⁴

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

⁷⁴ *Harris, supra* at 50.