

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 16, 2014

v

JASON LAROY THOMAS,

Defendant-Appellant.

No. 312744
St. Clair Circuit Court
LC No. 11-002887-FC

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of assault with intent to murder, MCL 750.83. Because (1) the trial court did not abuse its discretion in denying trial counsel’s motion to withdraw, (2) the trial court did not abuse its discretion in denying defendant’s motion for additional DNA testing, (3) no witness referenced any past criminal history of defendant, (4) there was sufficient evidence to support defendant’s conviction, and (5) none of the issues raised on appeal in defendant’s Standard 4 brief has any merit, we affirm.

I. BASIC FACTS

Defendant lived with his girlfriend, Pamela Pompper, in a house in Port Huron. The home was a single-family residence that was transformed into two separate apartment units. Each unit had its own door leading to the outside, but there also was an internal, “common” door that connected the two units. At the time of November 5, 2011, defendant and Pompper lived in the rear unit, number 2, and Amber Samson and her brother, Max Samson (Max), lived in the front unit, number 1.

On November 5, 2011, defendant, Pompper, Brooke Fox, and Jeremy Robinson, were all present at the number 2 apartment in the living room. Fox and Robinson started arguing that evening, and Pompper had told Robinson that he and Fox were to leave. Defendant took exception to this and became very angry with Pompper. According to Pompper, defendant “jumped off the couch” and said, “[D]on’t tell my mother f***ing friends they had to leave my house[!]” Defendant then jumped on Pompper and began repeatedly stabbing her with a 3-inch Winchester knife. Initially, defendant stabbed Pompper around the neck area and then proceeded to stab her in the neck, chest, shoulder, abdomen, thigh, hands, and forearms. All told, Pompper was stabbed 17 or 18 times.

In the front apartment, Max Samson was home along with two other individuals, Andrew Mackey and Johnny Cox. Mackey and Cox were Amber Samson's friends and were waiting there for her. Max testified that on November 5, 2011, he heard "bone chilling" screaming coming from apartment 1. He then forced open the locked common door separating the two apartment units. After walking in, Max was able to look into the living room, and he saw Pompper laying on the couch and defendant over top of her, stabbing her with a knife. Max saw defendant make three quick "jabs" with the knife before defendant turned to Max and said, "What's good. Do you want some too?" Fearing being attacked, Max, Mackey, and Cox retreated into the first apartment. After Max saw defendant leave, he re-entered apartment 2 and helped Pompper walk through both apartments to the front porch. While he waited for EMS to arrive, Max "held" her wounds to help prevent bleeding. When police arrived, Max, Mackey, and Cox all cooperated with them. Officer Ryan Mynsberge, who was the first to respond to the 911 call, noted that there were no visible injuries on Cox, Mackey, or Max.

At trial, defendant testified and claimed that he acted in self-defense and described the following details. Defendant admitted that he got upset when Pompper asked Robinson and Fox to leave the apartment. Defendant stated that this led to "more aggressive" arguing between him and Pompper and that he grabbed Pompper by the arm, hit her a few times, and yanked on her hair. According to defendant, Pompper then demanded that defendant leave immediately. Defendant testified that he wanted to get his clothes and belongings before leaving, but Pompper called for Johnny Cox to come over from the adjacent apartment to throw defendant out. Defendant then decided to block the front door to the apartment to prevent Cox from entering. However, Cox and three other men kicked the front door in, and they all entered. After fighting for a minute, one of the men¹ pulled a gun. In response, defendant pulled a knife. Pompper then (unsuccessfully) attempted to get the knife from him. The man with the gun also approached and tried to get the knife, but defendant stabbed him multiple times in the arm, chest, and stomach areas.² Then, Pompper exclaimed that she had a knife too, so defendant turned to her and stabbed her "a couple" times. After that, all four men rushed defendant, and defendant "snapped," went into a panic, and stabbed Pompper further with the knife. Defendant clarified that he never actually saw Pompper with a knife; he just saw her reaching for one. Defendant left the house, but he did not remember how he was able to escape from the four men who were charging him. During this entire episode, defendant suffered no injuries. After running away for a bit, defendant threw the knife toward a house. On cross-examination, defendant admitted that this was the first time he mentioned the presence of a gun to any government official. He also stated that he did not recall specific instances of him stabbing Pompper, but he did not deny stabbing her all those times.

¹ Defendant stated that he did not recognize the other three men who accompanied Cox and that it was one of these other men that pulled the gun. Defendant knew who Max Samson was, and Max was not one of the men.

² Defendant initially stated that he stabbed the man "maybe three times," but later during his testimony he stated that it was "at least four or five times."

The knife used in the attack was found in a back yard, several houses away. Lab testing revealed that the DNA from the dried blood on the blade matched Pompper's DNA.

The officer in charge, Detective Christopher Frazier, testified that during a subsequent search of defendant's apartment, the police found two steak-type knives: one was under a couch cushion and the other was actually underneath the couch itself in the living room. These two steak knives and the Winchester knife were tested for fingerprints and came back negative. Also found at the apartment was a black stocking cap. Pompper testified that defendant owned a black stocking cap. But before trial, defendant sought to have DNA testing conducted on the cap because he claimed that one of the four individuals who attacked him left the cap behind. The trial court denied the request because there was no evidence to suggest that the cap was related to the events that took place on November 5, 2011.

Doctors testified that the most life-threatening injury was the one to Pompper's neck, which was three inches long. The knife to the neck missed major arteries by a mere fraction of a centimeter. If it had not, Pompper would have bled to death before EMS arrived. The other injuries to her chest and abdomen also had the potential to be fatal. In addition, there was evidence that many of Pompper's wounds "clearly" were defensive. Of note, the stabbing of Pompper's arm was so forceful that it broke both bones in her forearm, in "at least two or three different areas."

Before trial, defense counsel Ronald Kaski moved to withdraw. Kaski cited "extreme difficulties in communicating, especially as it relates to what [defendant] would like done in the case." Defendant at the hearing stated that the difficulty arose from Kaski not filing certain motions that defendant wanted filed. After the trial court told defendant that a counsel's role is not to blindly follow a client's orders but instead to exercise independent sound judgment, the trial court granted Kaski's request and allowed him to withdraw as counsel.

Consequently, Donald Sheldon was appointed to represent defendant. But Sheldon also later moved to be allowed to withdraw as counsel. Sheldon explained that when he heard that defendant wanted certain witnesses subpoenaed, he went to talk with defendant. But during that conversation, defendant "indicated basically that he wasn't going to talk . . . any further." During this conversation, defendant accused Sheldon of "just trying to find information," announced that he no longer wanted Sheldon as his attorney, and left the meeting. At the motion hearing, Sheldon noted that defendant had filed a grievance against him. The trial court again informed defendant that counsel's job was not to follow every directive but instead to exercise sound professional judgment. The trial court denied Sheldon's motion because it concluded that defendant likely would act in the same disruptive way with any attorney.

After the conclusion of the three-day trial, the jury rejected defendant's claim of self-defense and found him guilty of assault with intent to murder.

II. BRIEF ON APPEAL

A. MOTION TO WITHDRAW

Defendant first argues that the trial court abused its discretion when it denied Sheldon's motion to withdraw as counsel. A trial court's decision on a motion to withdraw as counsel is

reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011).

“An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced.” *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). When reviewing a trial court’s decision to deny a defense counsel’s motion to withdraw, this Court considers the following factors:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court’s decision. [*Echavarria*, 233 Mich App at 369.]

Even though defendant asserted a constitutional right, the trial court’s decision to deny the request did not fall outside the range of reasonable and principled outcomes. Most importantly, the second factor weighs strongly against granting the motion because there was no “legitimate” reason for requesting new counsel. It is well established that a defendant cannot “purposefully break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is a good cause for a substitution of counsel.” *Traylor*, 245 Mich App at 462-463 (quotation marks omitted). Defense counsel Sheldon explained in his motion and at the hearing that defendant notified him that he wanted certain witnesses subpoenaed. As a result, Sheldon met with defendant, but “part way through this conference, Defendant stated that ‘you’re just trying to obtain information and not doing what I want and need done.’” Defendant then refused to provide any further information and walked out of the meeting. Sheldon also noted that before that meeting, defendant previously would refuse to discuss the legal merit for any of defendant’s other suggested courses of action. The above interactions display an unreasonable and irrational behavior on defendant’s part. To fail to purposely cooperate with appointed counsel is no reason to appoint new counsel. *Id.* As the trial court noted, being that this was defendant’s second appointed counsel, there was nothing to indicate that this type of behavior would not continue regardless of who was appointed counsel. Consequently, because any impediment in the attorney-client relationship was purposely and unreasonably imposed by defendant, there is not a legitimate or bona fide reason to appoint new counsel, and the trial court did not abuse its discretion in denying Sheldon’s request to withdraw.

B. REQUEST FOR ADDITIONAL DNA TESTING

Defendant on appeal argues that the trial court erred when it denied his request for DNA testing on certain items. To preserve an issue for appeal, the issue must be raised, addressed, and decided by the lower court. *People v Metamora Water Service, Inc*, 276 Mich App 376, 349; 741 NW2d 61 (2007). With respect to the requested testing on the stocking cap, that issue is preserved because defendant requested the testing, and the trial court denied the request.

However, to the extent that defendant on appeal argues that DNA testing should have been done on other items, that issue is not preserved because defendant did not request such testing, and the trial court never made any related rulings.

Both parties rely on the standard of review associated with the trial court's decision to admit evidence. However, that is not the ruling that is being challenged on appeal. Instead, the challenge is to the trial court's decision to deny testing of potential evidence. We were unable to locate any Michigan cases utilizing a specific standard of review for this particular type of issue. Therefore, for defendant's preserved issue, we conclude that the "default" standard of review should be used, which is whether the trial court abused its discretion. See *In re King*, 186 Mich App 456, 466; 465 NW2d 1 (1990). But we review any unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At the outset, to the extent that defendant argues that the trial court should have ordered DNA testing on the two steak knives and a coat that purportedly were found at the apartment, there is no plain error. Defendant did not request that these articles be subjected to DNA testing, and he does not provide any authority that would require a trial court to sua sponte order such testing. In fact, with respect to these items, defendant only requested fingerprint testing be done on the knives, and that testing was conducted. Accordingly, defendant has not established any error, plain or otherwise, and is not entitled to relief on these issues.

However, defendant did request that a stocking cap that was found at the apartment be tested for DNA, and the trial court expressly denied that request. Defendant's theory was that the cap was worn by one of the assailants that attacked him and that DNA testing would corroborate his version of events. However, defendant failed to establish how even if DNA testing did indicate that someone other than defendant or Pompper wore the hat, how that makes it more likely that defendant's testimony was true. That hat could have been left there by someone else days or even weeks before the incident occurred. In short, there was nothing on the record to indicate that the cap itself was related in any way to the events that unfolded on November 5, 2011. Accordingly, because the relevance of any such DNA results was negligible, the trial court did not abuse its discretion in failing to order the additional testing.

C. REFERENCE TO PAROLE

Defendant next argues that he was denied a fair trial because the officer in charge mentioned that he was on parole at the time of the crime. Because that is not what the officer stated, we find no merit in defendant's argument.

Defendant claims that the officer in charge, Detective Frazier, stated that defendant was on parole at the time of the crime. While referencing a defendant's past criminal history can inject undue prejudice at a criminal trial, see MRE 404(b); *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007), that does not appear to be what happened in the instant case. Detective Frazier was asked by the prosecutor on direct examination to recount the efforts the Port Huron Police Department undertook to locate defendant after he was identified as the main suspect. Detective Frazier explained as follows:

[W]hen we exhausted all the local leads, um, I re-interviewed the, the victim in this case to find out, you know, where else, what have we missed, where else could [defendant] have gone to. And, um, I was supplied some information about other possible locations California, Tennessee, and the most probable one was a brother in the Battle Creek area.

Um, I got a name and was told he was on parole. Um, made contact with the parole department in Calhoun County, dealt with an Agent Sutton and, um, through coordinated efforts with Agent Sutton I spoke with a, they have a special police unit for the Battle Creek police department that works in conjunction with the parole department. And they were able to do a parole check and during that parole check they made the arrest of [defendant].

From context, it appears that the reference to a person being on parole was in relation to defendant's brother, not defendant himself. The detective's statement, "I got a name and was told he was on parole" makes it clear that he was referring to someone other than defendant. First, the sentence was just a continuation of the detective's discussion related to defendant's "brother in the Battle Creek area."³ Thus, a natural understanding is that the non-specific terms "a name" and "he" referred to the last person mentioned, which was defendant's brother. Second, there is no doubt that the police already knew defendant's name at this time. Thus, it makes no sense for Detective Frazier to say "I got a name and was told he was on parole" if he was referring to defendant. Therefore, when viewed in context, contrary to defendant's claim, it is clear that Detective Frazier did not allege that defendant had a criminal history and was on parole at the time of this crime. Accordingly, defendant has failed to establish how he was denied a fair trial by virtue of the jury being informed that his brother was on parole at the time of the crime. Likewise, defendant has failed to establish how defense counsel was ineffective for failing to object to this permissible testimony. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) ("Counsel is not ineffective for failing to make a futile objection.").

D. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his conviction of assault with intent to commit murder.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007) (quotation marks omitted). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted).

³ The fact that the court reporter decided to inject a paragraph break between these two sentences in the transcript does not control our analysis.

In order to be convicted of assault with the intent to murder under MCL 750.83, the prosecution must prove beyond a reasonable doubt each of these elements: (1) defendant committed an assault, (2) defendant acted with an intent to kill, and (3) if successful, the killing would have been murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Defendant only challenges on appeal that the evidence was insufficient to meet the second element, that defendant intended to kill Pompper.

“The intent to kill may be proved by inference from any facts in evidence.” *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). And because of the difficulty of proving an actor’s state of mind, only minimal circumstantial evidence of intent to kill is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The intent to kill can be inferred from the manner of use of a dangerous weapon. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997).

In the instant case, defendant admitted at trial to stabbing Pompper with a knife. Thus, there is no question that his actions with the dangerous weapon were intentional. But his claims that he only intended to seriously harm Pompper are not availing because the evidence was nonetheless sufficient for a jury to conclude beyond a reasonable doubt that he intended to kill her. First, there was evidence that defendant stabbed Pompper 17 or 18 times all over her body. Additionally, the wounds were particularly gruesome, where one of the doctors testified that he had never seen “fileting [sic] of skin like that ever.” The doctor explained that they normally do not close stab injuries due to infection concerns, but because of the “large filets of tissue” they had to close these injuries, otherwise Pompper would have had “ten centimeter gaps of skin.” It is established that violence and multiple wounds resulting from an attack can support a finding of intent to kill. *People v Hoffmeister*, 394 Mich 155, 160; 229 NW2d 305 (1975). Moreover, the surgeon testified that many of the stab wounds were potentially fatal, including the ones on Pompper’s neck, which missed vital arteries by mere millimeters. If the strikes had landed slightly in a different place, then Pompper would have bled to death before EMS arrived. Slashing or stabbing someone in such an obvious vital area is evidence of an intent to kill. See *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010); *People v Drayton*, 168 Mich App 174, 177; 423 NW2d 606 (1988).

Therefore, when viewing all of the evidence in a light most favorable to the prosecution, the jury could have concluded beyond a reasonable doubt that defendant had the requisite intent to kill when he attacked Pompper, and defendant’s claim on appeal fails.

III. STANDARD 4 BRIEF

A. OFFICERS’ “ROUGH” NOTES

Defendant argues that the prosecution violated his constitutional rights by suppressing evidence that it had a duty to disclose. This unpreserved constitutional issue is reviewed for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 763-764.

Criminal defendants do not have a general right to discovery. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). But “[a] criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about

defendant's guilt." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005); see also *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish such a due-process violation, a defendant must prove the following four elements:

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Cox*, 268 Mich App at 448.]

We need not look beyond the first element to determine that defendant cannot establish a *Brady* violation. The thrust of defendant's position is that the police and the prosecutor possessed other "rough" notes and never disclosed them to defendant. However, the record indicates that only one rough note ever existed, and it was supplied to defendant. Defendant offers nothing in his Standard 4 brief to question the veracity of this information, except for his own unsupported speculation and supposition. Furthermore, even assuming that these other rough notes existed at some point, there is nothing in the record to indicate that their content in any way would have constituted "favorable evidence," thereby making them subject to *Brady* disclosure in the first place. Finally, there is nothing in the record to support defendant's accusation that these notes were intentionally destroyed. Therefore, defendant's claims based on a *Brady* violation necessarily fails.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel in numerous instances. Because defendant failed to preserve his argument by moving for a new trial or a *Ginther*⁴ hearing in the trial court and this Court denied his motion to remand for a *Ginther* hearing,⁵ our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁵ *People v Thomas*, unpublished order of the Court of Appeals, entered May 20, 2013 (Docket No. 312744).

App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). “Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant must overcome a strong presumption that counsel’s actions were based on reasonable trial strategy. *Cline*, 276 Mich App at 637. “Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy,” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008), “and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy,” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Further, the failure to present evidence amounts to ineffective assistance of counsel only if it would have deprived a defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). “A substantial defense is one that might have made a difference in the outcome of the trial.” *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

Defendant has alleged 17 instances of ineffective assistance of counsel in his brief (subparts A through Q). We have reviewed all of these claims and find that none has any merit. The vast majority of them deal with defendant’s displeasure with his counsel’s trial strategy. For the most part, defendant wanted his counsel to do exactly what he requested, including, *inter alia*, calling particular witnesses, asking specific questions of witnesses, and filing “motions” that defendant wrote himself. But in all of these instances, defendant has failed to rebut the presumption that counsel employed sound strategy.⁶ Further, we conclude that the outcome of the trial would not have been different had counsel acted as defendant desired.

Defendant also alleges that both Kaski and Sheldon were ineffective in failing to get “all” of the evidence found at the crime scene tested. This claim necessarily fails because defendant did not establish what the results of any further testing would have been and how it would have altered the jury’s verdict. More to the point, any results would have had no bearing on defendant’s claim of self-defense. As we discussed in Part II.B, *supra*, even if other items in the apartment, such as the stocking cap, contained hair from someone other than defendant or Pompper, there was nothing to link these items to the events that took place on November 5, 2011. Likewise, defendant’s argument that defense counsel should have requested an expert to test all of the forensic evidence is unavailing.

Defendant also maintains that counsel was ineffective for failing to properly seek remedies regarding defendant’s contention that various police officers’ rough notes were destroyed. However, there was nothing in the record to support defendant’s assertion that any officer’s rough notes were destroyed. Therefore, defendant has failed to establish the necessary factual predicate for his claim.

⁶ We also note that many of defendant’s directives had no basis in the law. As just one example, defendant alleges that counsel was ineffective for failing to request that Pompper be subjected to drug testing before being allowed to testify at trial.

C. TRANSCRIPT OMISSIONS

Defendant argues that virtually all of the lower court transcripts had “matters, information, material, and portions” omitted from them and that these omissions deprived him of due process by not being able to adequately review the lower court record and prepare his appeal. This unpreserved constitutional issue is reviewed for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 763-764.

Certified records of trial proceedings are presumed to be correct, but that presumption can be rebutted. *People v Abdella*, 200 Mich App 473, 475; 505 NW2d 18 (1993). “In order to overcome the presumption of accuracy and be entitled to relief, a petitioner must satisfy the following requirements: (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; and (4) describe how the claimed inaccuracy in transcription has adversely affected his ability to secure postconviction relief pursuant to subchapters 7.200 and 7.300 of our court rules.” *Id.* at 476 (footnote omitted).

Defendant has failed to overcome the presumption that the transcripts were correct. Most importantly, defendant fails to argue with specificity any alleged inaccuracy. Instead, he simply added comments to the citations in his brief, such as “some testimony omitted form [sic] transcript, or record” and “some portions are omitted from the transcripts or record.” Defendant also has not provided any independent corroboration of his claims. And our review of the transcripts did not indicate any obvious errors or omissions. Furthermore, there is nothing on the record to indicate that the court experienced any technical difficulties on the second day of trial that impeded the reporter’s ability to transcribe the proceedings, as defendant alleges. The only time hand-held microphones were used on the second day of trial was when witnesses were speaking so softly that the people in the courtroom had difficulty hearing the witnesses speak. But even when this difficulty to hear arose, the transcript nonetheless reflected the hard-to-hear statements. Additionally, the court reporter provided a sworn statement certifying that the transcript was “true and complete.” Accordingly, defendant failed to establish any plain error in his due-process claim.

With respect to defendant’s claim that only certain portions of his police interview were in the transcript, it appears that defendant is not arguing a transcription error, per se. Instead, it appears that he is arguing that only a portion of the interview was provided at trial. This is evident because he also alleges that he voiced his own concerns about this at trial, but those concerns also were missing from the transcript. Obviously, at the time of trial, he would not have known what would and what would not be captured on a subsequent transcript. Thus, we presume he was referring to the admission into evidence of parts of his interview. As such, the issue has nothing to do with any court reporter erroneously transcribing the proceedings. Moreover, we will note that not all of defendant’s statements during his police interview are admissible anyway. Only those portions introduced by *the prosecution* would be admissible under MRE 801(d)(2) as an admission from a party-opponent. So if defendant was expecting that all of his statements to the police should have been admitted, he is mistaken.

D. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct by knowingly allowing Pompper to commit perjury. Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). However, unpreserved constitutional claims are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

It is established that a prosecutor has a duty to correct perjured testimony; he may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). Defendant contends that Pompper falsely testified that she was stabbed in the head. But a review of the transcript does not support defendant's position. At the preliminary examination, Pompper testified that she initially "thought" that defendant had hit her in the head but she later realized that defendant was actually stabbing her. However, when she was asked to describe specifically where she was stabbed, she did not mention her head; she only stated that she had "scratch marks" on her head "like, from a knife," but they were not deep. There is nothing in the record to indicate that this testimony was false or, even if it was, that the prosecutor knew it was false.

The same result occurs when looking at Pompper's trial testimony. She testified that she initially thought defendant was hitting her in the head, but then realized that he "was really trying to stab though [her] head." Given that Pompper was testifying regarding what she *thought* defendant was thinking or attempting, it is impossible to show that this statement was false. Moreover, to the extent that the jury may have been confused by this testimony, Pompper later gave a detailed list of the areas that were stabbed, and she did not mention her head. Therefore, not only has defendant failed to establish that the prosecutor knowingly used any false testimony, he also cannot establish how any alleged false testimony prejudiced him when Pompper later clarified that her head was not stabbed.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood