

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

October 19, 2006

No. 261896

Wayne Circuit Court

LC No. 04-011745-01

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second conviction, MCL 750.227b. The trial court sentenced defendant to 12 to 60 years in prison for the assault with intent to commit murder conviction, six to ten years in prison for the assault with intent to do great bodily harm less than murder conviction, two to four years in prison for the felonious assault convictions, and three to five years in prison for the felon in possession conviction, to be served consecutive to five years in prison for the felony-firearm conviction. We affirm.

Defendant challenges the removal of African-American veniremembers during jury selection, pursuant to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We review de novo questions of law. *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005). We review a trial court's findings of fact for clear error. MCR 2.613(C); *Knight, supra* at 338.

Defendant challenged the removal of veniremembers 11 and 13. In *Batson, supra* at 96-98, the Court provided a three-step process for determining whether a peremptory challenge violates the Equal Protection Clause on the basis of the veniremember's race. *Knight, supra* at 335-336; see also US Const, Am XIV, § 1. First, defendant is required to make a prima facie showing of discrimination. *Id.* at 336. Then, the burden shifts to the prosecutor to articulate a race-neutral explanation for the strike. *Id.* at 337. Finally, the trial court must determine whether the explanation is a pretext and whether the defendant has proved purposeful discrimination. *Id.* at 337-338.

To establish a prima facie case of discrimination based on race, a defendant must show:

(1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*Knight, supra* at 336.]

The trial court found that the *Batson* threshold had not been met. In determining whether a defendant has made a prima facie case, the trial court must consider “all relevant circumstances, including whether there is a pattern of strikes against black jurors, the questions and statements made by the prosecutor during voir dire and in exercising his challenges, all of which may support or refute an inference of discriminatory purpose.” *People v Barker*, 179 Mich App 702, 705-706; 446 NW2d 549 (1989), citing *Batson, supra* at 97; *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).

Defendant is African-American, and thus a member of a cognizable racial group. The prosecutor exercised two peremptory challenges and excused veniremembers 8 and 11, who are African-American. In the instant case, the prosecutor exercised all 12 of his peremptory challenges, and two of the jurors sworn were African-American. There does not appear to be a pattern of strikes against African-American veniremembers, and the prosecutor did not ask any questions or make any statements during voir dire that support an inference of discrimination. The mere fact that the prosecutor used two peremptory challenges to excuse African-American veniremembers is insufficient to establish a prima facie showing of discrimination. *Williams, supra* at 137. We therefore conclude that defendant failed to establish a prima facie case of purposeful discrimination as defined in *Batson*. *Knight, supra* at 336. Accordingly, the prosecutor was not required to articulate a race-neutral explanation for his peremptory challenges, and the trial court was not required to determine whether defendant had proved purposeful discrimination. *Id.* at 337-338.

Defendant also challenges the removal of veniremember 13, who is African-American. Veniremember 13 was excused for cause after he repeatedly stated that he did not believe he could be fair and impartial because he had two family members who had been convicted of crimes and one was “locked up.” Defendant frames his argument in a *Batson* context, which is misguided because *Batson* applies only to peremptory challenges. Defendant has failed to explain how a veniremember’s removal for cause violates the Fourteenth Amendment or is otherwise improper. An appellant may not simply announce a position or assert an error and leave it to this Court to “discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendant also asserts that he had the right to a jury where the veniremembers were not stricken because of age and that the prosecutor failed to sustain his burden to provide age-neutral reasons. However, he does not further develop this argument. He provides no evidence of the age of the veniremembers or jurors, or any other evidence that any veniremembers were stricken on the basis of age. An appellant may not simply announce a position or assert an error and leave it to this Court to “discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Kevorkian, supra* at 389, quoting *Mitcham, supra* at 203.

Defendant next contends that the trial court violated his right to a jury drawn from a fair cross-section of the community. We disagree. We review de novo questions concerning the systematic exclusion of minorities in jury venires. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Defendant did not move the trial court for a new trial on this ground, and he did not raise this issue in his motion to remand with this Court.

“A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community.” *McKinney, supra* at 161 (quotations omitted), citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975); see also US Const, Am VI; Const 1963, art 1, § 14. To establish a prima facie violation of the fair cross-section requirement:

[T]he defendant must show (1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000).]

The prosecutor may overcome a prima facie violation of the fair cross-section requirement by showing “a significant state interest that manifestly and primarily advances those aspects of the jury selection process that would result in the disproportionate exclusion of a distinctive group, such as exemption criteria.” *People v Hubbard (After Remand)*, 217 Mich App 459, 473; 552 NW2d 493 (1996). Defendant is not entitled to a jury that exactly mirrors the community. *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997); *Hubbard, supra* at 472.

For Sixth Amendment fair cross-section purposes, African-Americans are considered a constitutionally cognizable group. *Hubbard, supra* at 473. On appeal, defendant submits a newspaper article not included in the lower court record detailing issues with Wayne County’s jury selection system. However, defendant may not expand the record, and this Court may not take judicial notice of newspaper articles because they are inadmissible hearsay. *McKinney, supra* at 161 n 4. Defendant neither proffered nor presented any evidence concerning the representation of African-Americans on jury venires in general. Because there is no evidence in the lower court record to support defendant’s argument, this Court cannot conduct a meaningful review. See *McKinney, supra* at 161-162.

Turning to a new issue, defendant argues that the trial court erred in admitting Deon Readus’s identification of defendant because the police only showed him one photograph. We review a trial court’s decision to admit identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (Griffin, J); *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Clear error exists when the reviewing court is left with a “definite and firm conviction that a mistake has been made.” *Kurylczyk, supra* at 303; *Harris, supra* at 51.

When a photographic identification procedure is “so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification[.]” it violates a defendant’s right to due process of law. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). When the police present a witness with only one photograph, the witness is tempted to presume that the

photograph is of the assailant. *Id.* If an identification procedure is invalid, this Court must determine whether the witness had an independent basis to identify the defendant in court. *Id.* at 114-115.

At the hearing on defendant's motion regarding the identification evidence, Readus could not recall whether the array he viewed contained six or nine photographs, but he knew they were arranged in rows of three. Readus denied that the police had only shown him one individual photograph. Generally, a photographic array is not suggestive if it contains some photographs that are sufficient to reasonably test the identification. *Kurylczyk, supra* at 304. The trial court found that the array contained six photographs on a single sheet, and that the procedure used was not unduly suggestive. With respect to a *Walker*<sup>1</sup> hearing, this Court recognizes that the trial court is in the best position to assess issues of credibility. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *People v Akins*, 259 Mich App 545, 566; 675 NW2d 863 (2003). In reaching its conclusion that Readus viewed an array containing six photographs, the trial court made a credibility determination, and we will defer to the trial court, which had a superior opportunity to evaluate credibility. Accordingly, we conclude that the trial court did not err in determining that the photographic identification procedure used with Readus was not impermissibly suggestive. Therefore, we need not consider whether Readus had an independent basis to identify defendant in court. *Gray, supra* at 114-115.

Defendant contends that the trial court erred in admitting Melanie McIver's identification of defendant at trial because defendant was singled out at the preliminary examination. If a pretrial identification procedure was impermissibly suggestive, the witness's in-court identification will not be allowed unless it was based on a sufficiently independent basis to purge the taint of the improper pretrial identification. *Kurylczyk, supra* at 302; *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

The defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. Simply because an identification procedure is suggestive does not mean it is necessarily constitutionally defective. The fact that the prior confrontation occurred during the preliminary examination, as opposed to a pretrial lineup or showup, does not necessarily mean that it cannot be considered unduly suggestive. When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. [*Id.* at 304-305 (citations omitted).]

Although McIver viewed Investigator Pamela Walker's photographic array three days after the shooting, she could not identify the shooter. Instead, McIver first identified defendant as the shooter at the preliminary examination on November 17, 2004. However, McIver had a

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<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

substantial opportunity to view the shooter during his argument with Readus and while the shooter was walking toward her. Although she was talking on her cellular telephone, McIver asserted that she had a good look at him and paid enough attention to be able to describe his height, weight, clothes, and gun. McIver identified defendant without any indication of uncertainty, and the description she gave the police is accurate. However, the preliminary examination occurred more than 16 months after the shooting, which is a relatively long span of time and likely reduces the reliability of the identification, especially considering that the identification occurred at the preliminary examination, which is a suggestive atmosphere. Therefore, we must determine whether McIver's identification was based on a sufficiently independent basis. *Kurylczyk, supra* at 302.

In *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), the Court provided the following list of factors for determining whether there is an independent basis for identification:

1. Prior relationship with or knowledge of the defendant.
2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.
3. Length of time between the offense and the disputed identification. . . .
4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
5. Any previous proper identification or failure to identify the defendant.
6. Any identification prior to lineup or showup of another person as defendant.
7. . . . [T]he nature of the alleged offense and the physical and psychological state of the victim. . . . Factors such as "fatigue, nervous exhaustion, alcohol and drugs", and age and intelligence of the witness are obviously relevant.
8. Any idiosyncratic or special features of defendant.

It is not necessary that these factors be given equal weight. *Kachar, supra* at 97.

McIver did not have a prior relationship with or knowledge of defendant. Although McIver was talking on her cellular telephone when the shooting occurred, it appears that she had a substantial opportunity to view the offense and provided specific details. She was five to ten feet away from the shooter, and she recalled streetlights, lights on the building, and a light in the parking lot. The shooting happened quickly, within a matter of seconds. McIver described the shooter's gun as a silver handgun, something like a nine millimeter. McIver first identified defendant at the preliminary examination, which occurred more than 16 months after the shooting. She also identified defendant at trial, which occurred more than 19 months after the shooting.

Although there was a relatively long time span between the shooting and McIver's identification of defendant and McIver failed to identify defendant from the photographic array,

she had a substantial opportunity to observe the shooting, and her initial description of defendant was accurate. Therefore, there was a sufficient independent basis for the identification. And, even if there was not a sufficient independent basis, reversal is not warranted because harmless error analysis applies. *People v Winans*, 187 Mich App 294, 299; 466 NW2d 731 (1991). Because Readus and Angela Hicks properly identified defendant as the shooter, and Roshandria King initially told the police that defendant was the shooter, any error that occurred in the admission of McIver's identification was harmless. Similarly, even if we were persuaded that McIver's viewing of defendant's photograph on the news tainted her identification, any error in admitting her identification was harmless. *Id.*

Defendant also claims that the trial court erred in admitting the in-court identification by Aubrey Hicks. Assuming, arguendo, that there was error, we conclude that any error was harmless.

Reversal is not warranted because Readus and Angela Hicks properly identified defendant as the shooter, and Roshandria King initially told the police that defendant was the shooter, any error that occurred in the admission of Aubrey's identification was harmless. *Winans*, *supra* at 299.

Defendant also argues that the prosecutor committed misconduct by vouching for the credibility of Sergeant Elhage during his closing argument. To preserve claims of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Because defendant failed to object to the challenged comments, this issue has not been properly preserved for appellate review and will be reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999); *Ackerman*, *supra* at 448. To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Barber*, *supra* at 296, citing *Carines*, *supra* at 763.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham*, *supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Generally, a prosecutor is permitted to argue from the evidence that a witness is worthy or not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). No error requiring reversal will be found if the prejudicial effect of the prosecutor's improper conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "[T]he prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, *supra* at 276.

During recross-examination, defense counsel questioned Elhage about whether Roshandria King had made a written statement that Elhage destroyed, whether she told King what to write in her statement, and how many photographs she showed King. We therefore conclude that the challenged remarks were responsive to defense counsel's attack on Elhage's credibility and must be considered in light of defense arguments. *Ackerman, supra* at 452; *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). The trial court instructed the jury that the lawyers' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Therefore, the prejudicial effect, if any, would have been cured by the jury instructions. Accordingly, we conclude that the prosecutor's remarks do not constitute vouching and did not deny defendant a fair trial.<sup>2</sup>

Defendant next contends that the trial court erred in refusing to provide the jury with an instruction on careless, reckless, or negligent use of a firearm with injury or death resulting, MCL 752.861, as a lesser offense of assault with intent to do great bodily harm less than murder, MCL 750.84. We disagree. Claims of instructional error are reviewed de novo, *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), and whether an offense is an inferior offense is a question of law that is likewise reviewed de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

MCL 768.32(1) "only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002). A cognate lesser offense shares some common elements with, and is of the same nature as, the greater offense, but also has elements that are not found in the charged offense. *Id.* at 357; *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). In contrast, all elements of a necessarily lesser included offense are contained within the greater offense, and it is impossible to commit the greater offense without first committing the lesser offense. *Cornell, supra* at 357; *People v Bearss*, 463 Mich 623, 632-633; 625 NW2d 10 (2001).

One commits reckless discharge of a firearm when he, "because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person[.]" MCL 752.861. The elements of assault with intent to do great bodily harm less than murder are "an attempt or threat with force or violence to do corporal harm to another (an assault)," and an intent to do serious injury of an aggravated nature, less than murder. MCL 750.84; *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Because reckless discharge of a firearm requires the

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<sup>2</sup> Defendant argues that he was denied the effective assistance of counsel by trial counsel's failure to object to these remarks. This issue is not properly before this Court because it was not included in the "statement of questions involved" section of defendant's brief on appeal as required by MCR 7.212(C)(5). Therefore, this issue is waived and not subject to appellate review. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

use of a firearm, and assault with intent to do great bodily harm less than murder does not require the use of a firearm, reckless discharge of a firearm is a cognate lesser offense of assault with intent to do great bodily harm less than murder. See *Lowery, supra* at 173-174. Therefore, the trial court was not permitted to instruct the jury on reckless or careless discharge. *Reese, supra* at 446; *Cornell, supra* at 356.

We also disagree with defendant's argument that the trial court erred in refusing to provide the jury with an instruction on mitigating circumstances regarding an assault with intent to commit murder charge. There is no per se rule that insulting words may never constitute adequate provocation, and what constitutes adequate provocation is a question of fact. *People v Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991). Defendant asserts that the situation was volatile and that it is undisputed that there was a fight before the shooting. Presumably, defendant is referring to his argument with Readus. Although Readus admitted that he was mad, had "an attitude," closed his fists, and was prepared to defend himself, there is no evidence that he engaged in a fistfight with defendant or anyone else. There is no evidence that any insults were exchanged, and the argument does not constitute adequate provocation. Accordingly, the trial court did not err in refusing to provide the mitigating circumstances jury instruction.

Defendant argues that the trial court erred in scoring OV 4 and OV 12. We disagree. We review a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant received ten points for OV 4, which takes into account serious psychological injury to the victim that "may require professional treatment." MCL 777.34(1)(a), (2) (emphasis added). Defendant relies on the fact that Readus declined to talk to the probation officer; however, "the fact that treatment is not sought is not conclusive when scoring the variable." *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). Further, the prosecution asserted that McIver might be seeking counseling. A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005). Therefore, the evidence was sufficient to support the trial court's decision to score OV 4 at ten points.

As to OV 12, pursuant to MCR 6.429(C), "[a] party may not raise on appeal an issue challenging" the accuracy of the presentence report or the scoring of the sentencing guidelines "unless the party has raised the issue" at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Because defendant did not challenge the trial court's scoring of OV 12, this issue has not been preserved for appellate review and will be reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 762-763; *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004).

Defendant received 25 points for OV 12, which takes into account contemporaneous felonious criminal acts. MCL 777.42. If the defendant committed three or more contemporaneous felonious criminal acts involving crimes against a person, the trial court should score the variable at 25 points unless the acts have not and will not result in a separate conviction. MCL 777.42(2)(a)(ii).

At trial, Readus stated that a man named “James” was shot in the “rear end” during the incident. Further, the witnesses testified that there were between 3 and 12 gunshots, and ten shell casings were recovered from the parking lot. Felonious assault is “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Warren*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The evidence that defendant fired ten gunshots into the crowd constitutes evidence of additional uncharged counts of felonious assault. Therefore, there was some evidence that there were three other contemporaneous felonious criminal acts against a person. *Houston, supra* at 471.

MCL 769.34(10) provides “If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” See also *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Because the trial court did not err in scoring defendant’s guidelines range, this Court must affirm his sentence. MCL 769.34(10).

Finally, defendant argues that he is entitled to a new trial on the basis of newly discovered evidence, i.e., Readus’s medical records. We disagree with each of defendant’s arguments pertaining to the medical records. Pursuant to MCR 2.611(B), a motion for new trial must be filed within 21 days after the entry of the judgment. In the instant case, defendant did not move the trial court for a new trial. Rather, he moved this Court for remand, which this Court denied. Defendant never presented the trial court with the medical records. Therefore, this issue has not been properly preserved for appellate review, *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998), and it will be reviewed for plain error affecting defendant’s substantial rights, *Carines, supra* at 762-763.

This Court applies the following four-part test for a motion for new trial on the basis of newly discovered evidence: “(1) ‘the evidence itself, not merely its materiality, was newly discovered’; (2) ‘the newly discovered evidence was not cumulative’; (3) ‘the party could not, using reasonable diligence, have discovered and produced the evidence at trial’; and (4) the new evidence makes a different result probable on retrial.” *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). Where the new evidence is offered only to impeach a witness, it is generally deemed merely cumulative. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977).

Readus’s medical records were newly discovered, but they may be deemed cumulative. Even assuming that defense counsel could have discovered and produced the evidence at trial, it is unlikely that the evidence makes a different result probable on retrial. *Cress, supra* at 692. At trial, Readus admitted that he consumed one or two alcoholic drinks before the shooting occurred, but he claimed that he was not intoxicated. During cross-examination, defense counsel challenged this assertion, inquiring about the ingredients, size, and alcoholic content of the drinks. Thus, any impeachment value of Readus’s BAC would have been cumulative or minimal. Similarly, because Readus admitted at trial that he was mad, had “an attitude,” closed his fists, and was prepared to defend himself, any impeachment value of the emergency

personnel's statement that defendant was "slightly combative" would have been cumulative or minimal.<sup>3</sup>

Although defendant claims that there were other witnesses who could testify that he was not the shooter, we are aware of no affidavits or other evidence to support this claim. Defendant did not attach any such affidavits to his brief on appeal, and the lower court record does not contain any such affidavits. Therefore, this claim is without merit.

Defendant also contends that the prosecutor violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in failing to produce the requested medical records. MCR 6.201(B)(1) provides that the prosecutor must provide the defendant "any exculpatory information or evidence known to the prosecuting attorney." A criminal defendant has a right to exculpatory evidence in the prosecutor's possession if "it would raise a reasonable doubt about the defendant's guilt." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). In order to establish a *Brady* violation,

[A] defendant must prove: (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, supra* at 448.]

Defendant has failed to prove a *Brady* violation. There is no evidence that the prosecutor possessed or suppressed the medical records. As is discussed above, defendant has not shown that there is a reasonable probability that the outcome of the proceedings would have been different, i.e., that he would have been acquitted if trial counsel had received the medical records.

Alternatively, defendant argues that, to the extent trial counsel failed to exercise due diligence in obtaining Readus's medical records, he was denied the effective assistance of counsel. This issue is not properly before this Court because it was not included in the "statement of questions involved" section of defendant's brief on appeal as required by MCR 7.212(C)(5). Therefore, this issue is deemed waived and not subject to appellate review. *Mackle, supra* at 604 n 4; *Miller, supra* at 172.

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<sup>3</sup> Defendant did not attach Readus's medical records to his brief on appeal, and they are not contained in the lower court record. Thus, we are unable to determine whether the medical records could have been used to impeach Readus's testimony that he was in the hospital for three months. Defendant also claims that Readus's combative nature with the emergency personnel would have supported his request for a jury instruction on mitigating circumstances or in arguing imperfect self-defense. However, as we previously concluded, defendant has presented no evidence that Readus did or said anything that constitutes adequate provocation.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood