

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE TEEL,

Defendant-Appellant.

UNPUBLISHED

June 26, 2007

No. 264588

Wayne Circuit Court

LC No. 05-001274-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANTOINE TEEL,

Defendant-Appellee.

No. 273860

Wayne Circuit Court

LC No. 05-001274-01

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to ten to thirty years' imprisonment for the assault with intent to murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant filed a motion for new trial, asserting that there was newly discovered evidence, the verdict was against the great weight of the evidence, and trial counsel was ineffective. The trial court denied the motion by rejecting the arguments raised by the defense and holding that the case hinged on the credibility of witnesses, an issue for the jury. A second motion for new trial was filed, and a *Ginther*¹ hearing was held. The trial court rejected defendant's rationale for granting a new trial, but sua sponte granted the motion by concluding that the victim's testimony was fully impeached

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

and illogical. In Docket No. 273860, the prosecutor appeals as of right from the trial court's order granting defendant's motion for a new trial, and we reverse the trial court's order. In Docket No. 264588, defendant appeals his convictions as of right, and we affirm.

Defendant's convictions arise from the shooting of Alexis Coleman. The victim had a daughter named Lillian who married Ricky Teel, defendant's brother, in June 2004. On December 7, 2004, there was a fire in the house in which the couple resided, and Lillian died as a result of injuries suffered in the fire. Ricky Teel also was burned in the fire and suffered injuries when he fell from the second floor bathroom window. The other occupants of the home, Lillian's children and her sister, survived the fire. The victim blamed Ricky Teel for the death of her daughter Lillian and asserted that he had a financial stake in her death because of an inheritance and a life insurance policy. She testified that she openly stated this belief at Lillian's funeral and questioned the fire department about the cause of the fire.

On the day of the fire, the victim went to the hospital where she visited Ricky Teel in his hospital room. As she was leaving the room, she encountered defendant and mentioned how much he resembled Ricky. On December 18, 2004, the victim attended Lillian's funeral, and she saw defendant at the funeral. Later that evening, the victim was at home when Cheryl Meredith advised her that there were men in a vehicle out front asking for "Alexis." Family and friends commonly knew the victim as "Lex." After a short time period, the victim left her home and approached the vehicle. She testified that defendant was in the driver's seat, and he lifted a gun from his side and shot her in the face. The victim fell to the ground, and the vehicle drove off. When medical personnel and police arrived on the scene, the victim reportedly told police that she did not know the *name* of the shooter, but knew him as "her daughter's husband's brother." At that time, the victim believed that she was going to die because of the heavy blood flow from her face and had difficulty speaking because the bullet had landed in front of her vocal chords in her throat.

There were inconsistencies in the victim's statements, and the inconsistencies were presented to the jury. At various stages, the victim identified the color of the vehicle as green, purple, or turquoise. Additionally, one statement identified defendant's other brother, Curtis, as the passenger in the vehicle. Although the victim was not expressly questioned about her drug use at the time of the shooting, she was asked whether she suffered from any "impairment," and she denied the assertion. Ultimately, defendant was convicted as charged. The trial court initially upheld the jury verdict, following a motion for new trial. However, after the *Ginther* hearing, the trial court issued a written opinion regarding defendant's second motion for new trial. In the opinion, the trial court denied the motion based on the issues raised by the defense. However, the trial court granted a new trial because it held that the verdict resulted in a miscarriage of justice on grounds not raised by the defense, specifically the victim's credibility. The trial court held:

A court may grant a motion for new trial on any grounds that could support appellate reversal of the conviction because it believes that the verdict resulted in a miscarriage of justice. MCR 6.431 (B).

This court is well aware that is [sic] does not sit as the "thirteenth juror" however, the court is in a unique position to view the evidence and the witnesses and the evidence presented in court. *See, People v Lemmon*, 456 US [sic] 625,

576 Mich 625, 576 NW2d 129 (1998), overruling *People v. Herbert*, 444 Mich 466, 476, 511 N.W. 2d (1993).

In the case at bar at the preliminary examination Alexis Coleman stated that she had no idea why the defendant would shoot her. At trial she testified that the car the shooter was driving was a Taurus, odd in color, turquoiseish, purplish, grayish, or lavenderish. When speaking to the responding officers, she described the vehicle as a green car.

After being released from the hospital, she described the car as gray or turquoise to Detective Leonard at the 13th Precinct of the Detroit Police Department. She denied giving the police the name Curtis, although in her statement taken after she was released from the hospital it appears 8 times.

Detroit Police Officer Schrameck responded to the scene and took a verbal statement from the Complainant, which was later reduced to writing. In that statement, she testified that the shooters [sic] vehicle was green. The officer also testified that on the scene the Complainant told him that the passenger shot her and that she did not know who the driver was.

When the officer was asked how Ms. Coleman came up with the name Antoine Teel, he indicated from his report that she first came in contact with Antoine and Curtis the night of the fire.

The medical records, which the court reviewed during these proceedings, revealed that Ms. Coleman had been using cocaine before she was brought into the hospital on the night of the offense. A witness who was presented at the evidentiary hearing, Cheryl Meredith testified that before the shooting Ms. Coleman has been using heroin.

Ms. Meredith also testified that she saw the perpetrators and they were small men. The complainant described the defendant as fat. Police documents describe the defendant's height as 5'10 and his weight is listed as 200 lbs.

The Michigan Supreme Court has recognized the negative effect of drug use on identification. *People v Anderson*, 389 Mich 155, 211 (1973). The Complainant's testimony regarding the identification of the perpetrator of the offense varies so widely that it is clear to this court that the ingestion of drugs adversely affected her perception and recollection.

Furthermore, whenever an identifying witness has failed to identify the defendant or identified someone else, this misidentification becomes relevant. *Manson v Braithwaite*, 432 US 98, 106 (1977).

Her testimony has been fully impeached and is so illogical that the court finds that it may legitimately grant a new trial on the basis of her lack of credibility. *People v Lemmon*, 456 Mich 625, 648, 575 NW2d 129 (1998).

It is hereby ordered that Defendant's Motion for a New Trial is GRANTED.

The prosecutor appeals by leave granted from the trial court's order granting a new trial, and we reverse that holding.

I. DOCKET NO. 273860

A trial court's decision to grant or deny a motion for a new trial is entrusted to the discretion of the trial court, and the decision would not be disturbed on appeal absent an abuse of that discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion occurs when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003). Recent case law has held that at the core of the abuse of discretion standard is the acknowledgement that there will be circumstances in which there will be no single correct outcome, but rather there can be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Id.* With regard to a trial court's factual findings rendered following the *Ginther* hearing, those findings are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed de novo on appeal. *Id.* In this case, the trial court abused its discretion in granting defendant's motion for new trial by sua sponte raising the question of the credibility of the complaining witness, particularly where the majority of the inconsistencies in the victim's testimony were presented to the jury and the jury nonetheless concluded that the victim was credible and convicted defendant.

In *Lemmon*, *supra*, the defendant was convicted of five counts of criminal sexual conduct following a jury trial. The complainants were the daughters of the defendant's former girlfriend. The complainants alleged that sexual abuse occurred by the defendant when their mom was not home. However, defense counsel was able to elicit testimony from the complainants in which they admitted to lying, stealing, and smoking. The defendant alleged that he had broken off the relationship because his ex-girlfriend was jealous and denied the sexual abuse. Following a motion for a new trial, the court granted the motion, holding that verdict was against the great weight of the evidence, particularly in light of the contradictory testimony and demeanor of the complainants, and it acted as the "thirteenth juror." *Id.* at 629-631.

The Court of Appeals remanded the case to the trial court for specific findings of fact and conclusions of law. On remand, the trial court held that the witnesses lacked credibility because they had giggled at inappropriate times and were not embarrassed or hesitant despite the sensitive subject matter. The trial court also noted that the only testimony supporting guilt was the complainants' testimony, and there was no supporting medical records, counseling records, or corroborating testimony. The Court of Appeals denied the application for leave following the trial court's decision on remand, but expressed its disagreement with the "thirteenth juror"

principle cited by the trial court from *People v Herbert*, 444 Mich 466, 476; 511 NW2d 654 (1993). *Id.* at 632-633.

The Supreme Court granted leave to examine the validity of the “thirteenth juror” principle set forth in *Herbert, supra*. The *Herbert* decision held that, when reviewing a motion for new trial, the judge acts as the thirteenth juror. That is, the trial judge is entitled to evaluate the credibility and demeanor of the witnesses in determining whether a new trial is warranted. However, the *Lemmon* Court overruled that standard and stated that “we clarify that a judge may not repudiate a jury verdict on the ground that ‘he disbelieves the testimony of witnesses for the prevailing party.’” *Id.* at 636. In addressing the thirteenth juror standard, the Supreme Court stated that the jury is the final arbiter of credibility and to allow the trial judge to sit as a thirteenth juror and overrule the credibility determinations of the jury suggests that a judge may freely repudiate the jury’s findings. In fact, the decision to overrule a jury verdict was to be approached with great trepidation and reserve, with the presumption that it will not be invoked except under the highest circumstances, not a mere disagreement with the outcome. *Id.* at 637-638.

After examining the history of the thirteenth juror rule and the holding that it should be applied only in exceptional cases, the Supreme Court articulated a new standard when examining a motion for new trial:

Thus, “a new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.” ...

We align ourselves with those appellate courts holding that, absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility “for the constitutionally guaranteed jury determination thereof.” We reiterate the observation ... that, when testimony is in direct conflict and testimony supporting the verdict has been impeached, if “it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,” the credibility of witnesses is for the jury.

Adding flesh to what is a more refined articulation of the formula that “[i]n general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial,” ... federal circuit courts have carved out a very narrow exception to the rule that the trial court may not take the testimony away from the jury. Defining the exception, the federal courts have developed several tests that would allow application of the exception; for example, if the “testimony contradicts indisputable physical facts or laws,” ... “[w]here testimony is patently incredible or defies physical realities,” “[w]here a witness’s testimony is material and is so inherently implausible that it could not be believed by a reasonable juror,” ... or where the witness’ testimony has been seriously “impeached” and the case marked by “uncertainties and discrepancies.”

This does not mean that “[a] judge’s disagreement with the jury’s verdict,” ... or a “trial judge’s rejection of all or part of the testimony of a witness or

witnesses” entitles a defendant to a new trial. ... Rather, a trial judge must determine if one of the tests applies so that it would seriously undermine the credibility of a witness’ testimony and, if so, is there “a real concern that an innocent person may have been convicted” or that “it would be a manifest injustice” to allow the guilty verdict to stand. ... If the “evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions,” the judge may not disturb the jury findings although his judgment might incline him the other way. Any “real concern” that an innocent person has been convicted would arise “only if the credible trial evidence weighs more heavily in [the defendant’s] favor than against it.” [*Id.* at 642-645 (citations omitted).]

The *Lemmon* Court then returned to the factual scenario before it. The Court noted that the conflicting testimony and the credibility of the witnesses was the predominant reason for the new trial. However, the jury was able to see, hear, and observe the victims and the defendant and determined credibility. When viewing all the evidence, the jury found defendant guilty. “The question being one of credibility posed by diametrically opposed versions of the events in question, the trial court was obligated, ‘despite any misgivings or inclinations to disagree,’ to leave the test of credibility where statute, case law, common law, and the constitution repose it ‘in the trier of fact.’” *Id.* at 646-647. Finally, the Court stated:

Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. The reasons cited do not evidence that the testimony contradicts indisputable physical facts or law. Any suggestion that the testimony is patently incredible or is so inherently implausible that it could not be believed by a reasonable juror is undermined by the court’s earlier conclusion that the evidence justified the conviction.

The reasons asserted by the trial judge for granting a new trial were grounded in the erroneous view that she could employ her status as a thirteenth juror to set aside the jury verdict. The trial court’s duty to protect the process encompasses a duty to the defendant, to the public, and to the constitutionally guaranteed role of the jury as determiner of disputed facts. We hold that fidelity to these principles dictates that, in this category of cases, the judge does not sit as a thirteenth juror. The thirteenth juror principle is an erroneous legal standard. It does not establish that an innocent person has been found guilty, or that the evidence preponderates heavily against the verdict so that it would be a serious miscarriage of justice to permit the verdict to stand. [*Id.* at 647.]

In light of the holding of the *Lemmon* decision, the trial court’s decision to grant a new trial constituted an abuse of discretion. Similar to *Lemmon, supra*, the trial court in the present case reviewed the case following the first motion for a new trial and concluded that the evidence justified the conviction, holding that the case hinged on witness credibility, an issue for the trier of fact. Following the second motion, the trial court concluded that the impeachment of the witness warranted a new trial. However, the reasons cited for the grant of a new trial do not support any such entitlement or were presented for the jury to review.

In examining the opinion granting a new trial, the trial court stated that the victim, at the preliminary examination, could not provide a reason why defendant would shoot her. However, we are unaware of any legal requirement imposed upon a victim to explain why he or she became the victim of a crime. If such a requirement were imposed, then there would never be any convictions for random acts of violence that were the result of opportunity such as a robber mugging an elderly woman of her purse in a parking lot. In fact, case law appears to be contrary to the holding of the trial court. In *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), the Supreme Court held that “motive is never an essential element to be proved in a criminal case.” Although the prosecutor frequently presents a motive or theory of the case to the jury to aid in understanding why a person was the victim of a crime, it is not an essential element. Thus, the trial court’s reliance on this ground does not support the grant of a new trial.²

Next, the trial court cited to the fact that the shooter was driving a Taurus, but gave different descriptions of the color. The victim identified the vehicle as green, then stated it appeared to be turquoiseish, purplish, grayish, or lavenderish. However, the various descriptions of the color of the vehicle were information that was presented to the jury. Despite the contradictions in vehicle color, the jury nonetheless convicted defendant of the offense.

Moreover, the victim gave plausible reasons for the disparity in the description of the vehicle’s color. When asked whether the victim told the police officer responding to the scene if the color of the car was green, the victim could not recall. The victim noted that she was bleeding at the time and could not see if she was speaking to an ambulance technician or police officer. The officer and the victim were unsure if the victim was going to perish as a result of the gunshot wound. Consequently, the victim identified her assailant to the best of her abilities; she told police that she could not describe the shooter, but knew him as “her daughter’s husband’s brother.” In light of this ability to identify, but not specifically name, the shooter, the color of the car probably seemed inconsequential to the victim under the circumstances when she thought she was dying, whereas the police wanted a description of the car to canvas the area to see if the shooter was still in the vicinity. It should be noted though that the victim never wrote a statement at this time and did not sign a statement as true. Rather, the testimony revealed that the predominant concern at that time was stopping the heavy blood flow from her face as a result of the gunshot wound. With regard to the vehicle being grey, turquoise, lavender, or purple, the victim testified that the color of the vehicle varied based on the available lighting. She testified that the vehicle appeared to be one color based on the lighting from her kitchen window and appeared a different color when she approached it parked on the street near a streetlight. Despite

² We note that, at trial, the victim testified that she was grieving the loss of her daughter and made statements implicating Ricky in her death. At the preliminary examination, the victim may not have realized that Ricky viewed those statements as a threat or felt that those statements may have led to further investigation into the fire that killed Lillian. However, after the passage of time, the victim had time to discover a motive including a financial interest in Lillian’s potential inheritance and an insurance policy. Indeed, Lillian’s sister testified at the *Ginther* hearing that Ricky Teel inquired about the insurance policy after her death and mentioned that Lillian intended for him to be the beneficiary. Irrespective of the fact that motive is not a necessary element of a case, the fact that a theory of the case or motive was not present at the preliminary examination is inconsequential.

being unable to definitively identify the color of the car, the jury nonetheless found the victim's testimony and explanation for the disparity to be credible and convicted defendant of the charged offenses. Thus, the alleged report of a "green" car and subsequent different descriptions of vehicle color were presented to the jury and does not warrant a new trial.³

The next reason proffered for granting a new trial was based on inconsistencies in the victim's statements to police. In a written statement to police, the victim denied any allegation that she identified Ricky Teel's other brother, Curtis, as the passenger in the vehicle at the time of the shooting. Despite the denial, Curtis was mentioned eight times in the statement. Furthermore, the victim alleged that she was unable to read the statement and the officer read the statement to her, but the officer testified to the contrary. However, both the victim and the officer were in agreement that the victim was in a highly emotional state at the time of the statement. The victim frequently broke down and had to stop the interview. The officer offered her Kleenex because of the repeated breakdowns. This information cited by the trial court as a basis for granting a new trial was presented to the jury, which nonetheless convicted defendant of assault with intent to murder. As stated in *Lemmon, supra*, conflicting testimony, even when impeached to some extent, is an insufficient basis for granting a new trial. Perhaps, more importantly, the identification of Curtis in this statement was not as the shooter. Rather, even if there was a conflict in the evidence regarding the identification of the passenger as Jerell Beaver or Curtis Teel; for purposes of this trial, the conflict was not a material, but rather, a collateral issue in the case. The passenger was not on trial for any crime. Rather, defendant was the only person charged with a crime, was the only person on trial, and was the only person *consistently* identified as the shooter. Thus, any impeachment regarding the inconsistency in the identification of the passenger does not warrant a new trial, particularly when the issue was presented to the jury. *Lemmon, supra*.

Next, the trial court held that a new trial was warranted because of the victim's drug use. With regard to this issue, the court stated that the medical records revealed that the victim had been using cocaine before she was brought into the hospital on the night of the offense and that a witness, Cheryl Meredith, testified that the victim was using heroin before the shooting. The trial court then noted that the victim's "testimony regarding the identification of the perpetrator of the offense varies so widely that it is clear to this court that the ingestion of drugs adversely

³ During the *Ginther* hearing, the prosecutor alleged that she contacted a representative of the Ford Motor Company and learned of a "frost" or "pearl" paint color that appeared to be different colors based on the available lighting. The defense asserted, without presenting evidence, that the vehicle color was not manufactured at the time of the model at issue. However, the burden of proof for a new trial traditionally lies with the moving party. Defendant bears the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal is predicated. *People v Elston*, 426 Mich 751, 762; 614 NW2d 595 (2000). A narrative, blanket assertion by the defense about the vehicle's paint color does not satisfy this evidentiary requirement. Moreover, because the *Ginther* hearing was adjourned on multiple occasions, the parties had the opportunity to present evidence on this issue, but did not do so. Consequently, there was no new information on this issue other than what had been presented to the jury at trial. It does not provide a basis for a new trial.

affected her perception and recollection.” We cannot locate evidentiary support for the trial court’s conclusion in the record.⁴

The trial court stated that the drug use by the victim as set forth in the medical reports and as set forth by the testimony of Cheryl Meredith warranted a new trial. However, the trial court reached factual conclusions where there were contradictions in the record, and the trial court did not resolve the contradictions and did not ask the parties to submit evidence to aid in the resolution of any conflict. The trial court concluded that the medical records revealed that the victim utilized cocaine before she was brought into the hospital on the night of the offense, and that Meredith stated that she used heroin before the shooting. Review of the medical records reveals that when brought into the hospital for treatment after the shooting, the victim was reportedly a non-smoker and non-drinker whose recreational drug use included marijuana and heroin. However, the medical testing revealed the presence of cocaine, but the amount of cocaine in the victim’s system was not delineated in the report. There is no indication that there were any traces of heroin in the victim’s system. On December 22, 2004, there was a medical consultation with the victim at her request. Contrary to the earlier medical report, this report indicated that the victim was a smoker who consumed a minimal amount of alcohol. The victim denied marijuana use. She reported that she occasionally used cocaine and used heroin. On this date, the victim stated that she had been through rehab on two occasions and expressed a willingness to return. The record recommended that the victim receive a referral to a facility for treatment.

This medical record, in and of itself, did not warrant the grant of a new trial. There were inconsistencies between the types of drugs that the victim used at the time of admission to the hospital and at the time of the second consultation four days later. It could be that the victim did not provide accurate information when, as she explained at trial, she was hysterical because she thought that she was going to die where she was bleeding profusely from a gunshot wound to the face. A reporting error could have occurred on the part of the person taking the record. Thirdly, there could have been a misunderstanding with regard to what the victim was stating because of the blood loss and the fact that the bullet had landed in or near the victim’s throat. Both the victim and police testified that the bullet impaired her ability to speak. In any event, while the trial court cited to the medical records for cocaine use and Meredith’s testimony for heroin use, the medical records only revealed a test of positive for cocaine, and the level of cocaine in her system was not recorded. Moreover, Meredith’s testimony was effectively discredited by the medical tests because there is no indication that there was a positive test for heroin.

⁴ We note that trial counsel and the trial prosecutor did not question the victim regarding drug use. Trial counsel did inquire whether there was anything that may have impaired the victim’s ability to identify the perpetrator, and the victim said no. After reviewing the record, it appears that the failure to attack the victim on this point may have been a matter of trial strategy. The victim had buried her daughter on the day that she was shot, and the prosecutor’s theory was that the victim’s suspicions, inquiries, and accusations regarding the fire coupled with Ricky Teel’s financial benefits were the motive behind the shooting. Attacking a shooting victim who had just buried her daughter might have made the defense look poorly in the eyes of the jury.

Furthermore, the trial court *limited* testimony regarding the impact of drugs on the victim when it denied the defense motion for a new trial, but granted the request based on the victim's credibility and drug use. The prosecutor attempted to question the victim regarding the impact of drugs on her and whether she was still feeling any of the effects of drug use at the time of the shooting. The defense objected to the questioning, claiming that the victim was not a chemist and the trial court sustained the objection. However, the defense, with the burden of proof with regard to a new trial, *Elston, supra*, and the prosecutor did not admit expert testimony regarding the impact of drugs on a person's perception. Further, even though the victim was not a chemist, she certainly was in a position to describe what impact drugs had her, how much she consumed, and how long the consumption would last. She also could have testified whether long-term drug use had de-sensitized her to the effect of drugs. It is questionable why the trial court would grant a new trial on this basis, but not allow the victim to testify regarding drug use or request that the parties bring in an expert to testify regarding drug use. However, the victim testified at the original trial that she was not impaired such that it impacted her identification of the shooter. Therefore, the reliance on the contradictory medical records and the testimony of Meredith regarding drug use that was not supported by the record to order a new trial constituted an abuse of discretion where the trial court's factual findings are not supported by the record and the defense burden of proof was not met.⁵

The trial court also relied on Meredith's testimony that the victim used heroin with Meredith before the shooting. However, there was no indication in the medical records that the victim tested positive for heroin use. Despite this contradiction with Meredith's testimony, the trial court then noted that Meredith testified that she saw the perpetrators and described them as small men, but the complainant described the perpetrator as fat. Again, these conclusions do not appear to be uncontroverted facts and the trial court did not determine or delineate how it reached its factual conclusions. Meredith did not testify at trial, only at the *Ginther* hearing. When she testified at the *Ginther* hearing, she denied telling police or the defense investigator that the assailants were small. Rather, her testimony was that that she told police that the men were not skinny or fat, but described them as "husky." Further, it is unclear how the trial court concluded that the victim testified that her assailant was fat. She repeatedly referred to him as a man she knew, but could not expressly name.

The trial court concluded that the victim's testimony was fully impeached and so illogical that a new trial was warranted on the basis of lack of credibility. As previously stated, a trial court's factual findings are reviewed under the clearly erroneous standard. *LeBlanc, supra*. However, the trial court's factual findings are contrary to the jury's verdict and the jury was presented with the majority of the impeached testimony given by the victim. The victim did not give a description of the shooter, but identified him as a married relative to her daughter. She

⁵ In discussing this issue, the trial court concluded, without any underlying foundation, that the victim's drug use impacted her perception and played a role in identification or misidentification. However, the conflict or misidentification in this case pertained to the passenger. The victim consistently identified defendant as the shooter, no one else. The passenger was not on trial. Moreover, the victim did not describe clothing or physical characteristics of the shooter. Rather, she identified the shooter based on his relationship to her.

provided the shooter's name after identifying him from a wedding photograph and obtaining the name of her identification with the assistance of relatives. Although the victim's drug use was not brought out in the first trial, the trial court's conclusion that her description was so altered by drug use does also not comport with the record. The trial court refused to allow the victim to testify regarding drug use on her perception, and the trial court did not have the parties' submit expert testimony on the type of drugs ingested by the victim, the level of drugs in her system, and the impact on perception. Therefore, defendant did not meet his burden of proof on this issue. *Elston, supra*.

In summary, the trial court's decision violates the instructions set forth in *Lemmon, supra*. Impeachment of a witness is an insufficient basis upon which to grant a new trial. Three of the inconsistencies cited by the trial court were presented to the jury, and the jury nonetheless found the victim to be credible. The only information that was not presented to the jury was drug use. The medical report revealed inconsistencies in the drugs that the victim had consumed. However, it is unclear how those inconsistencies were compiled in the report. Nonetheless, the only drug found in the victim's system was cocaine and the level was not introduced at trial and was not deemed in the chart to be significant. There is no indication that the victim could not be given certain medications because of the illegal drug in her system. The defendant has the burden of verifying facts to support reversal. *Elston, supra*. Instead, the trial court made assumptions that were not contained in the record. Therefore, an abuse of discretion occurred. In Docket No. 273860, we reverse the trial court's order granting defendant's motion for new trial based on credibility. *Lemmon, supra*.

II. DOCKET NO. 264588

Defendant first alleges that trial counsel was ineffective. To establish a claim of ineffective assistance of counsel, defendant bears the burden of establishing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To demonstrate prejudice, defendant must establish a reasonable probability that the outcome of the trial would have been different but for trial counsel's error. *Id.* at 6. A reviewing court does not assess competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

The first challenge is to defense counsel's failure to obtain and utilize the victim's medical records to impeach her testimony. However, defendant failed to overcome the presumption that the action might be considered trial strategy, *Tommolino, supra*, and that the outcome of the proceedings would have been different. *Hoag, supra*. The victim was shot in the face on the day she buried her daughter. Irrespective of any drug use, for that reason, the jury may have been sympathetic to her, and a blatant attack on her for drug use may have swayed the jury against the defense. Thus, it may have been sound trial strategy to fail to examine the victim on this issue. Defense counsel did inquire whether the victim suffered from any impairment on the evening of the shooting, and she denied the assertion. At the *Ginther* hearing, there was no expert testimony from medical personnel to discuss the amount of drugs found in her system at the hospital, the type of drugs in her system, and the impact of the type of drugs ingested. Additionally, defense counsel stated that he believed that the impartial alibi witness, the hospital

worker, constituted sufficient evidence of reasonable doubt and buttressed the theory of misidentification. Consequently, we cannot conclude that the outcome of the proceedings would have been different. *Hoag, supra*.

Defendant also asserts that trial counsel was ineffective for failing to present evidence from Cheryl Meredith and to present evidence that Lillian reported the victim as dead. However, Meredith could not identify the men in the car and admitted that she had consumed drugs on the day of the incident. The testimony regarded Lillian's relationship with the victim constituted a collateral matter that merely would have delayed the trial. Moreover, defendant testified at trial regarding Lillian's report of her mother's death. Consequently, this claimed error is without merit.

Defendant next asserts that it was erroneous for trial counsel to obtain the arson report. Again, this issue is one of trial strategy that would not change the outcome of the trial. *Hoag, supra; Tommolino, supra*. It is important to note that the trial court limited the amount of evidence that could be admitted regarding the fire, concluding that it would not hold a trial within a trial regarding the alleged arson. Furthermore, the fire investigator did not rule the case an arson; he testified at the *Ginther* hearing that it was because he was required to eliminate certain causes, and he could not do so. Additionally, efforts to learn about what transpired in the home were based on witness accounts, and Ricky Teel reportedly refused to come in and give a statement to the arson investigator. Thus, this portion of the arson investigation would not have been favorable to the defense. Therefore, it was effective trial strategy to avoid this area and also a moot issue in light of the trial court's instruction that it would not conduct a trial within a trial.

Lastly, defendant asserts that it was error to fail to request a continuance when evidence about the passenger was discovered, error to fail to attack the prosecutor's theory of the case, and error to fail to admit evidence of defendant's ownership of a Taurus. However, we cannot conclude that these allegations constitute error, but fall under the category of trial strategy for which the presumption was not overcome. *Tommolino, supra*.

Defendant next asserts that the trial court erred in ruling that the prosecution failed to provide the defense with evidence that it was constitutionally obligated to disclose, a *Brady*⁶ violation. The trial court's factual findings are reviewed under the clearly erroneous standard, *LeBlanc, supra*, and the trial court did not find a *Brady* violation. There is no general constitutional right to discovery in a criminal case, and due process only requires that the prosecutor provide a criminal defendant with material, exculpatory evidence in its possession. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447 n 4; 722 NW2d 254 (2006). To show 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 and could not have obtained it with the exercise of 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." *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998).

⁶ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

After review of the record in this case, we cannot conclude that the trial court clearly erred in its factual findings because the factors to establish a *Brady* violation were not established. The first criteria to establish a violation could not be satisfied because the information was not exculpatory or favorable to the defense. The evidence was designed to identify the person who was in the car with defendant at the time of the shooting. It would have served as circumstantial evidence to corroborate the prosecutor's theory of the case. Secondly, it is questionable how the information was unavailable to defendant. Defendant knew a person with the initials "J.B." or "J," and he had to know that the prosecutor would try to tie that individual to defendant if she learned that defendant associated with such a person. Thirdly, the prosecutor indicated that she did not suppress the favorable evidence. Indeed, the prosecutor testified regarding the time line for learning of the information. The effort to learn of the passenger was made three days before trial was to commence. The prosecutor also described how the information came in piece meal. That is, she learned of ownership of a vehicle, but did not have a photo of the person to whom the vehicle was registered and also did not know of the vehicle's color. Under the circumstances, defendant failed to meet the four criteria for establishing a *Brady* violation. *Fox, supra*.

Defendant next raises various claims of prosecutorial misconduct. We cannot conclude that this issue has merit. The duty of the prosecutor is to seek justice and not merely convict a defendant. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A claim of prosecutorial misconduct is reviewed on a case-by-case basis, with the remarks examined in context to assess whether the defendant was denied a fair and impartial trial. *Id.* If a defendant fails to object to a claim of prosecutorial misconduct, the claim is reviewed for plain error that was outcome determinative. *Id.* Error requiring reversal will not be found where the prejudicial effect of the prosecutor's comments could have been remedied by a timely instruction. *Id.* The prosecutor's 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 Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Watson, supra* at 588.

The trial court concluded that the prosecutor did not engage in misconduct. The trial court's factual findings in this regard were not clearly erroneous. *LeBlanc, supra*. With regard to the cross examination of the witnesses, prosecutorial misconduct did not occur.

One of the elementary principles of cross-examination is that the party having the right of cross-examine has a right to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness. [*People v Bell*, 88 Mich App 345, 349; 276 NW2d 605 (1979), quoting *People v Dellabonda*, 265 Mich 486, 499-500; 251 NW 594 (1933).]

The appellate courts have recognized the importance of broad cross-examination because it establishes a witness's interest in testifying and the narrow scope of the trial judge's discretion with regard to limiting cross-examination. *Id.* Any objection to cross-examination in this case is unwarranted. The prosecutor was entitled to ask why the defense did not try to prevent the case

from proceeding to trial by presenting the alibi witnesses to the police or the prosecutor. Furthermore, the hospital worker's memory in light of the fact that he failed to chart his work with patients was also a valid inquiry. Furthermore, there is no indication that there was an objection to the prosecutor's conduct. Therefore, the conduct is reviewed for plain error affecting substantial rights, and plain error was not established.

Finally, we cannot conclude that the prosecutor denigrated defense counsel or that the burden of proof was diluted based on the prosecutor's statements in closing argument. The jury was instructed that the arguments of counsel are not evidence, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Additionally, prosecutors are free to argue the evidence and any reasonable inferences arising from the evidence and need not couch their argument in the blandest possible terms. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). Review of the record reveals that the prosecutor did not argue facts not in evidence, but inferences from the evidence. This claimed error does not provide defendant with relief.

Next, the defense alleges that the trial court's evidentiary rulings deprived him of due process of law. We disagree. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Recent case law concludes that at the core of the abuse of discretion standard is the acknowledgment that there will be circumstances in which there will be no single correct outcome, but rather there can be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion, and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes." *Id.* A decision on a close evidentiary question ordinary cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Under the circumstances of this case, the trial court's evidentiary rulings did not constitute an abuse of discretion. The trial court properly admitted the victim's opinion regarding the arson. The victim's opinion was introduced to establish a motive for the crime. Although motive is not an essential element of any crime, it places the crime in context and gives the jury an understanding of why things transpired. Indeed, case law provides that "evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (citations omitted). "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *Id.* at 741. Thus, the trial court's decision to admit the evidence regarding the fire did not constitute an abuse of discretion.

Secondly, the trial court's decision to exclude additional information regarding the fire was not an abuse of discretion. The subject of this trial was assault with intent to commit murder. It was not a trial about a prior murder and arson. The trial court allowed the evidence in for the limited purpose of connecting the victim and defendant. Whether Lillian died as a result

of arson was a collateral matter. Moreover, at the *Ginther* hearing, it was learned that perhaps the arson investigator's testimony would not have been favorable to the defense. Even though he opined that it was not arson and was "undetermined," that conclusion was largely premised on the factors that he had to eliminate to reach the arson analysis. Moreover, he could not thoroughly perform the analysis because Ricky Teel, defendant's brother, refused to speak to him.

Lastly, the victim testified that she only had six teeth and was saving money to fix her teeth, but gave the money to Lillian for the wedding. Defendant contends that the trial court erred in refusing to allow questioning on this issue. However, when a ruling excluding evidence occurs, the burden rests with the party to present an offer of proof of the substance of the testimony that was excluded. MRE 103(a)(2); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999). Because of an offer of proof regarding the excluded testimony was not presented, we cannot examine in context whether the defense assertion has merit. However, it appeared that defense counsel may have asserted that the funds came from an illegal source of income or from disability checks that should have been utilized for the care of the victim's daughter, Danielle. Under the circumstances, the decision to exclude further questioning about the \$2,000 was not an abuse of discretion because it addressed a collateral matter to the assault with intent to murder charge, and an offer of proof was not preserved in the lower court record.

In Docket No. 273860, we reverse the trial court's order granting defendant's motion for a new trial, and in Docket No. 264588, we affirm defendant's convictions.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood