

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMAR FOETOIE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
December 9, 2010

No. 288763
Kalamazoo Circuit Court
LC No. 2008-000209-FC

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to consecutive terms of 30 to 65 years' imprisonment for the murder conviction and 18 to 30 years for the assault conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions stem from the December 15, 2007 shooting death of Anthony Potts, the victim, inside a club on Parsons Street in Kalamazoo. Many witnesses present in the club that evening similarly described at trial that a verbal altercation had commenced between members of different, rival neighborhoods (C-Block and D-Block), which quickly escalated into weapon flashing and gunfire. Antonio Taylor and Tykwan Buchanan were the first club guests to draw guns in a fashion threatening to one another. Most club patrons who testified at trial agreed that Taylor had fired the first shots that evening, either into the air or at Buchanan, prompting Buchanan, the victim, and multiple female club patrons to flee toward the lone bathroom at the rear of the small club. Most witnesses also agreed that Taylor had ceased shooting after firing several shots, although a new round of gunfire began within a brief period. According to multiple witnesses, defendant took possession of Taylor's large handgun and fired many gunshots directly into the club's bathroom; some of the club patrons present did not actually see defendant fire the second round of gunshots. While in the bathroom, the victim sustained a single gunshot wound that transected an artery, rapidly causing his death.

I

Initially, defendant avers that the trial court deprived him of the constitutional right to a unanimous verdict, in light of the facts that (1) the court advised the jury that it could convict

defendant of murder if he either shot the victim or aided and abetted the shooting, but (2) no evidence at trial supported a finding by the jury that defendant aided and abetted the shooting of the victim. Defendant suggests that “[b]ecause only one of the alternative theories is supported by sufficient evidence, and there is no indication which theory the jury convicted under, reversal is required.”

We review de novo claims of instructional error. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). “We review jury instructions in their entirety to determine if error requiring reversal occurred.” *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). A trial court has the obligation “to clearly present the case to the jury and instruct on the applicable law. Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence.” *McKinney*, 258 Mich App at 162-163. However, “[e]ven if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Aldrich*, 246 Mich App at 124. “In order to protect a defendant’s right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement.” *People v Smielewski*, 235 Mich App 196, 201; 596 NW2d 636 (1999). However, this Court has reasoned, “[W]e are not convinced that . . . reversal is required when a jury is instructed with regard to two theories of guilt, but charged that it need not unanimously agree on a single theory in order to convict, unless . . . the evidence was . . . insufficient to justify the submission of one of the two theories to the jury.” *Id.* at 206.

With respect to defendant’s contention that the evidence at trial did not adequately support his murder conviction pursuant to an aiding and abetting theory, we consider de novo defense insufficiency claims. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). This Court must view the evidence in the light most favorable to the prosecution to determine “whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). An appellate court should not interfere with the factfinder’s role to gauge the weight of the evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (internal quotation omitted).]

In MCL 767.39, our Legislature sanctioned as follows the conviction of a person who aids or abets another in perpetrating a crime: “Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction punished as if he had directly committed such offense.” See also *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). To convict a defendant of aiding and abetting a crime, the prosecutor must prove that “(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of

the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that (the defendant) gave aid and encouragement.” *Id.* at 6 (internal quotation omitted).

The evidence presented in this case supported the jury’s finding beyond a reasonable doubt both that defendant committed a second-degree murder in shooting the victim,¹ and that defendant aided or abetted the second-degree murder of the victim. Kennethia Hill, the first eyewitness to the December 15, 2007 shooting to testify at trial, recounted seeing Taylor and Buchanan draw weapons, and Taylor fire his handgun toward the club’s bathroom; when Taylor stopped firing, defendant took the handgun from Taylor, approached at least a couple additional steps toward the restroom at the rear of the club, and fired repeatedly toward the bathroom. Christopher Hoggan, who had accompanied the victim to the club shortly before the shooting, similarly identified Taylor at trial as the first person to shoot toward the bathroom, and that when Taylor stopped shooting, defendant approached Taylor, chastised Taylor with words to the effect of, “[M]an, what you doing; let me show you how to do it,” and then fired multiple gunshots directly at the bathroom. Club patron Shatoya Stewart also recalled that Taylor had commenced the gunfire inside the club, and that within “one second” or “one minute” of Taylor ceasing fire, defendant “came in” and “started shooting toward the bathroom.” Taylor denied ever having fired a shot on December 15, 2007, but described that defendant had taken his Glock handgun from Taylor’s possession and fired multiple times toward the bathroom in “self defense,” after Buchanan had shot at them. Four other witnesses to the shooting agreed that the gunfire that morning had occurred in two discrete segments; several of these witnesses identified Taylor as the first to fire gunshots. Four trial witnesses testified that the victim had suffered his lone gunshot wound inside the bathroom in the course of the second phase of the gunfire inside the club, although one witness believed the victim had been fatally wounded during the first round of shots toward the bathroom.

¹ Consistent with the elements examined in *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998), and set forth in CJI2d 16.05, the trial court properly instructed the jury on second-degree murder as follows:

First, that the defendant caused the death of Anthony Potts; that is, that Anthony Potts died as a result of a gunshot wound.

Second, that the defendant had one of these three states of mind:

He intended to kill; or

He intended to do great bodily harm to Anthony Potts; or

He knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.

Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.

Abundant evidence at trial thus warranted a conclusion by the jury beyond a reasonable doubt that defendant had committed the second-degree murder of the victim, which defendant's appellate counsel does not challenge on appeal. Although most of the trial evidence consistently pointed toward defendant having inflicted the single gunshot wound that killed the victim, some evidence tended to establish that Taylor might have fired the fatal gunshot, in the initial burst of gunfire inside the club. Alternatively stated, a rational view of the evidence presented at trial likewise establishes beyond a reasonable doubt that defendant aided and abetted Taylor in murdering the victim: (1) either defendant or Taylor fatally shot the victim, (2) defendant performed acts or gave encouragement that assisted in the commission of the murder, as reflected in the ample trial testimony concerning a coordination of successive gunfire toward the club restroom by Taylor and defendant, and (3) a wealth of direct and circumstantial trial evidence reasonably supports either that (a) defendant shot the handgun intending to kill someone, intending to cause great bodily harm, or in "wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm," *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998), or (b) when defendant gave Taylor assistance he knew that Taylor intended to kill, intended to cause great bodily harm, or acted in wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm.

II

Defendant next raises several claims of prosecutorial misconduct, specifically that the prosecutor (1) shifted the burden of proof during closing argument, (2) bolstered Taylor's trial testimony by eliciting inadmissible hearsay during her trial examination of Detective Michael Slancik, (3) prompted Hill's characterization of defendant as "evil," and emphasized defendant's evil nature in the course of closing arguments, and (4) appealed to juror sympathy by stating in closing arguments that on the day before the victim's murder he had bought shoes for his son. At trial, defendant offered no objection to any of the purported instances of prosecutorial misconduct.

Because the alleged error[s were] not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain (outcome-determinative) error. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. [*People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).]

This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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), criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

We review alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A

The first instance of allegedly improper burden shifting related to the absence of a murder weapon from the evidence presented at trial. In defense counsel's closing argument, he emphasized, in relevant part as follows, the prosecutor's failure to produce the murder weapon:

But you can't bless this mess. First of all, the prosecutor has not presented into evidence the gun that they believe killed [the victim]. The only gun in evidence is the gun that Mr. Buchanan had. And my client couldn't have shot the .32-caliber. You can't bless this mess.

In other words, the prosecutor has not admitted into evidence a weapon that was supposedly used by my client. She hasn't admitted into evidence one single, concrete piece of evidence that would suggest that my client had a gun and shot a gun or was shooting that evening.

In rebuttal, the prosecutor replied:

Ladies and gentlemen—You know what?—this isn't Hollywood, California; this is Kalamazoo, Michigan. This is not the O.J. Simpson trial: you must acquit if it doesn't fit. Come on, folks. Don't let this type of argument insult your own integrity.

He's saying in here because we didn't bring in the gun that killed [the victim] that you must acquit? Well, why don't you ask the C-Block gang where the gun is then. But yet he's praising Detective Slancik as being the most thorough detective that he's seen in a while. You're turning all—

* * *

So how is it that Detective Slancik is supposed to get the gun from the C-Blockers? Is he supposed to go and say come on, you guys . . .

Can I have the C-Block . . . names up, please?

[A]sk all those C-Blocker names, you know, come and get me that gun, come and give me that gun?

* * *

So let's talk about—we're supposed to ask Lamar Johnson, the defendant, who's part of the C-Block gang, give me the gun that you used? Wouldn't that have been nice?

Oh, we're supposed to ask Daniel McDonald, John Hopkins, Antonio Taylor, Donald Cobbs, Demario Marcus, and Robert Stevenson? Of course they're not going to give us that gun. That was the gun that killed [the victim]. Again, don't let this insult your integrity, ladies and gentlemen.

Our review of the prosecutor's rebuttal comments, as a whole and in light of defense counsel's closing argument references to the unproduced murder weapon, reveal no improper prosecutorial burden shifting. The prosecutor directly responded to defense counsel's suggestions that the jury should acquit defendant because the prosecutor had not introduced the murder weapon. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007); *Schutte*, 240 Mich App at 721. Additionally, the prosecutor neither said nor insinuated that defendant bore the burden to provide the murder weapon. The prosecutor instead properly stressed, on the basis of the evidence and reasonable inferences arising from it—specifically the trial testimony that a friend of defendant's gave him the gun after defendant had dropped it in front of the club as they departed the scene—the unlikelihood that defendant or his friends would turn the gun defendant fired over to the police. *Dobek*, 274 Mich App at 64; *Schutte*, 240 Mich App at 721.

Defendant's other complaint of prosecutorial burden shifting also challenges a rebuttal argument remark by the prosecutor. In defense counsel's closing argument, he put forth the following defense theory: "The truth of the matter, ladies and gentlemen, is we don't believe that [the victim] was shot in that bathroom. We've argued it throughout the case. We've questioned witnesses. But we just don't believe he was shot in the bathroom." In rebuttal, the prosecutor responded, in pertinent part, "So the whole defense in this case is that . . . [the victim] was not shot in the bathroom? I couldn't quite fathom exactly where the defense was going. There's been no evidence to the contrary. [The victim] was in the bathroom. Everybody says" In light of the consistent testimony by many witnesses at trial reflecting that the victim had sought shelter in the club bathroom where he met his demise, we conclude that the prosecutor properly attacked the credibility of the defense theory to the contrary. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005) (explaining that "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof"); *Callon*, 256 Mich App at 331 (noting that "[a] prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment," and that "[h]ere, the prosecutor did not shift the burden of proof; she merely attacked the credibility of a theory defendant advanced at trial").

B

Defendant maintains that the prosecutor elicited inadmissible hearsay in the course of trial testimony by Detective Slancik, the lead detective in the victim's murder investigation, when the prosecutor asked the detective about prior consistent statements Taylor had made during pretrial interviews with the detective. We review this issue only for plain error, in light of defendant's neglect to object to the challenged testimony at trial either on evidentiary or prosecutorial misconduct grounds. Even accepting defendant's position that Detective Slancik's testimony about details of prior out-of-court statements by Taylor did not qualify as admissible under MRE 801(d)(1)(B) because a "consistent statement made after the motive to fabricate

arose does not fall within the parameters of the hearsay exclusion for prior consistent statements,” we nonetheless detect no prejudice affecting defendant’s substantial rights. *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001). The prosecutor’s brief, redirect inquiries of Detective Slancik focused on Taylor’s out-of-court statements that defendant had taken possession of Taylor’s handgun and fired “numerous times.” Given that the properly admitted trial testimony of multiple witnesses to the shooting established that defendant took possession of Taylor’s handgun and that defendant fired multiple gunshots toward the club bathroom, any error in the admission of Taylor’s prior consistent statements did not affect the outcome of defendant’s trial. *Id.* at 642-643.²

C

Defendant next submits that the prosecutor engaged in misconduct when she solicited trial testimony that defendant was evil and emphasized defendant’s evil nature during her closing argument. Our reading of the trial record belies defendant’s contention that the prosecutor elicited shooting witness Hill’s description of defendant as evil. Rather, once defense counsel had at some length questioned the credibility of Hill’s trial identification of defendant as having shot at the club bathroom, the prosecutor rehabilitated Hill’s identification by querying about her opportunity to view defendant’s face on the morning of the shooting:

The Prosecutor: And the defense attorney talks a lot about braids, hair, hat, were you focusing on braids, hair, and hat?

Hill: No, I was focusing on the face.

The Prosecutor: On the face. Why would you focus on one’s face and not one’s hair, Ms. Hill?

Hill: I didn’t like his hairstyle. No—

* * *

—it was because, I mean, that’s just—that’s all I saw it was just his face. It was so evil. . . .

* * *

² The prosecutor’s limited redirect examination of Detective Slancik about prior consistent statements of Taylor followed defense counsel’s cross-examination exploration of the manner in which Taylor’s revelation of details regarding the shooting evolved in the course of several discussions with Slancik. Defendant does not suggest that the prosecutor made her redirect inquiries of Detective Slancik in bad faith, and after reviewing the record we cannot characterize the prosecutor’s questions as steeped in bad faith. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (observing that “prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence”).

The Prosecutor: And you said something about the lip. What . . . do you mean about that lip?

Hill: I remember his lips. They was like—you know, like real evil just like (demonstrates) and he was shooting and shooting. And it was just crazy to me.

For reasons not clear from the trial transcript, the trial court overruled a defense objection to the “prejudicial” effect conveyed by the “evil” descriptor. Defendant on appeal cites no authority for the proposition that a witness’s description of a defendant’s facial expression as “evil” amounts to evidentiary error, essentially abandoning the evidentiary issue. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). The prosecutor’s lone closing argument reference to Hill’s testimony that “she will never forget that mean, evil face that defendant displayed that evening” constituted proper argument premised on Hill’s identification testimony at trial. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005), aff’d 475 Mich 101; 715 NW2d 24 (2006) (finding no error in the prosecutor’s vivid description of the defendant “as ‘cold blooded’ and the crime as ‘evil’” because the prosecutor owes no obligation to limit arguments to bland and uncontroversial phrasing, and the argument “did not unfairly depict the evidence of the crime or [the] defendant’s state of mind”).

D

Defendant lastly asserts that the prosecutor improperly appealed to juror sympathy in a closing argument mention of the victim. Near the close of the prosecutor’s rebuttal argument, she summarized in part, “Again, this man—the defendant—in the middle is the one that came into the bar shooting repeatedly into the direction of [the victim], the man that earlier that day was buying shoes for his son.” The prosecutor premised the mention of the victim’s shopping trip on brief trial testimony by the victim’s longtime friend about what he and the victim had done on the day leading up to the shooting. As a general principle, a prosecutor’s “[a]ppeals to the jury to sympathize with the victim constitute improper argument.” *Watson*, 245 Mich App at 591. However, we find that the prosecutor’s reference to the victim in this case did not rise to the level of the appeals to sympathy at issue in *Watson*, the sole case cited by defendant, or the cases cited in *Watson*. See *Watson*, 245 Mich App at 591 (characterizing “as not so inflammatory as to prejudice [the] defendant” the prosecutor’s isolated opening statement declaration that the defendant had “treated [the victim] in a way that no animal should be treated”); *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999) (finding the prosecutor’s opening statement mention that “the decedent’s wife had lost both a husband and a friend” a “proper comment[] regarding the evidence the prosecutor intended to present,” and that the “display of the decedent’s picture and accompanying comments during closing argument” was not a “blatant appeal[] to the jury’s sympathy and . . . not so inflammatory that [the] defendant was prejudiced”); *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988) (condemning the prosecutor’s repeated closing argument descriptions of the victim as “the poor innocent baby”); *People v Wise*, 134 Mich App 82, 104-106; 351 NW2d 255 (1984) (characterizing the prosecutor’s closing argument comment concerning the victim’s desire for justice as an improper appeal to jury sympathy, but declining to find error requiring reversal). Even assuming some impropriety, no prejudice affecting defendant’s substantial rights exists in this case in light of the isolated nature of the comment by the prosecutor, the overwhelming evidence of defendant’s guilt, and the trial court’s instructions to the jury that it should not let

sympathy influence its verdict and that it should not consider the attorneys' arguments as evidence. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

III

Defendant avers that his counsel rendered ineffective assistance when he failed to (1) request an instruction on voluntary manslaughter, (2) object to the aiding and abetting instruction, and (3) object to the alleged instances of prosecutorial misconduct. Because defendant did not move for a new trial or an evidentiary hearing in the trial court, we limit our review to mistakes apparent in the trial court record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews for clear error a trial court's findings of fact, and considers de novo questions of constitutional law. *Id.*

"[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

The trial court instructed the jury on the elements of first-degree murder and second-degree murder, but not the elements of voluntary manslaughter. "When a defendant is charged with murder, instructions for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). "To prove voluntary manslaughter, the prosecution must prove that: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *Id.*

After reviewing the entire record, we find no rational view of the trial evidence supportive of a voluntary manslaughter instruction. The evidence does not rationally support a finding of adequate provocation as it relates to the gunshots that defendant fired. The trial testimony agreed that the initial confrontation developed between Taylor and Buchanan, Taylor

and Buchanan drew weapons and fired at one another, and only after Taylor had completed firing did defendant take the gun from Taylor and shoot at Buchanan.³ Because the record contains no rational foundation for a voluntary manslaughter instruction, defense counsel's neglect to ask for such an instruction did not fall below an objective standard of reasonableness. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Furthermore, the record reflects that the defense at trial constituted a rejection that defendant had participated at all in the shooting of the victim. Defense counsel's pursuit of "an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). In summary, the absence of a request for a voluntary manslaughter instruction did not amount to ineffective assistance by defense counsel.

With respect to the trial court's aiding or abetting instruction, defendant offers no criticism of the content of the instruction, but instead reiterates his prior contention that no evidence justified his conviction under an aiding or abetting theory. However, as discussed in Issue I, *supra*, ample evidence proved defendant's guilt of the victim's murder both as the principal actor in the second-degree murder of the victim and as an aider or abettor of the victim's second-degree murder. Because the evidence warranted an aiding or abetting instruction, defense counsel need not have objected to it. *Thomas*, 260 Mich App at 457. Similar logic guides our conclusion with respect to defendant's final ineffective assistance of counsel contention premised on counsel's failure to object to the purported instances of prosecutorial misconduct examined in Issue II, *supra*: because the prosecutor did not shift the burden of proof, bolster Taylor's testimony, elicit Hill's testimony about and later comment on defendant's evil nature, or improperly appeal to jury sympathy, any objections by defense counsel would have been meritless. *Id.* Alternatively, no reasonable likelihood exists that defense counsel's failure to object to alleged prosecutorial misconduct affected the outcome of defendant's trial, given the isolated nature of the purported prosecutorial misconduct and the substantial evidence of defendant's guilt. *Solmonson*, 261 Mich App at 663-664.

IV

In a Standard 4⁴ brief on appeal, defendant urges that unfair pretrial identification procedures deprived him of a fair trial, and that defense counsel was ineffective for neglecting to challenge Buckley's and Hill's trial identifications of defendant. We generally review for clear error a trial court's ruling whether to admit identification evidence; clear error exists only when this Court is left with a definite and firm conviction that the trial court made a mistake. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). However, when a defendant fails to preserve his claims of error, we consider them on appeal only for any plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A court must evaluate the fairness of a photographic identification procedure in light of the totality of the circumstances. *Kurylczyk*, 443 Mich at 306. A

³ And, as Hoggan testified at trial, when defendant took the gun away from Taylor he announced, "Man, what you doing, let me show you how to do it."

⁴ Supreme Court Administrative Order 2004-6, Standard 4.

photographic identification procedure denies a defendant due process of law when the procedure qualifies as so suggestive that it gives rise to a substantial likelihood of misidentification. *Id.*

Defendant challenges Buckley's identification testimony on the grounds that she made inconsistent pretrial statements to the police and that Detective Brett Pittelkow showed Buckley a suggestive photographic lineup comprised of only three photographs. Defendant cites no portion of the trial record supporting the three-photograph lineup contention, and our review of the record has uncovered no evidentiary support for this assertion. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415; 615 NW2d 691 (2000) The three-person lineup information possibly came from a police report defendant references elsewhere in his Standard 4 brief, but the report does not appear in the trial court record.

The record illustrates that Buckley and Hill, the witnesses who identified defendant before trial, made their identifications on the basis of a photograph Buckley took of defendant and other C-Block members on the night of the shooting. The photograph depicts more than six African-American men easily visible in the foreground. Cf., *People v Gray*, 457 Mich 107, 109; 577 NW2d 92 (1998) (the police showed the victim a photograph of the defendant alone). Nothing in the record suggests either that the photograph had a composition that rendered it unduly suggestive in any respect, or that the police engaged in conduct or made statements that unduly suggested Buckley's or Hill's identification of defendant from the photograph. The police showed the photograph taken at the club to Buckley and Hill because both had asked to see it. Both Buckley and Hill were present inside the club when the photograph was taken, and Buckley and Hill believed that the shooter would appear in the club photograph. Because defendant simply has not substantiated that Buckley's and Hill's pretrial viewing of the photograph taken at the club was "so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification," *Gray*, 457 Mich at 111, the trial court properly allowed the photograph taken at the club into evidence and Buckley's and Hill's identification testimony at trial.

And defense counsel need not have lodged groundless objections to the proper pretrial photograph viewing and identification testimony at trial by Buckley and Hill. *Thomas*, 260 Mich App at 457. Defendant additionally asserts that his trial counsel was ineffective for "fail[ing] to present a defense theory and subjecting the prosecutions [sic] case to a meaningful adversarial testing." Defendant elaborates only that his counsel conducted no "pretrial investigation of any substantive defense." But defendant has not supplied any specific examples of defense counsel's lack of "adversarial testing" or any matters counsel failed to investigate and present at trial. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (stressing that the defendant "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel"); *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (cautioning that a defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims). Furthermore, our reading of the record confirms that defendant's trial counsel pursued the defense that no evidence directly linked defendant to the victim's murder, and that defense counsel aptly and thoroughly cross-examined the many prosecution witnesses. Although the jury obviously did not accept the trial defense, counsel is not ineffective merely because a trial strategy backfired. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378

(1987). We conclude that defendant has not established that defense counsel's conduct fell below an objective level of reasonableness.

Defendant finally claims that insufficient evidence supported his second-degree murder conviction, which contravened the great weight of the evidence. Because defendant did not in the trial court seek a new trial on the ground that his murder conviction went against the great weight of the evidence, we consider his unpreserved new trial contention only for plain error affecting his substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

As we already have discussed in Issue I, *supra*, ample evidence warranted defendant's second-degree murder conviction, either as the principal or as an aider or abettor in the killing. Defendant highlights perceived holes and inconsistencies in the trial record, but ignores that the applicable legal standard of review dictates that we review the evidence in the light most favorable to the prosecution and resolve all credibility determinations and evidentiary conflicts in favor of the prosecution. *Nowack*, 462 Mich at 400. Furthermore, none of defendant's criticisms of the trial record, either alone or taken together, convince us that the trial "evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219. We emphasize that "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial," and that a wealth of properly admitted direct and circumstantial evidence supported the jury's second-degree murder verdict. *Id.* (internal quotation omitted).⁵

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

⁵ To the extent that defendant within his second Standard 4 brief issue criticizes the trial court's admission of an autopsy photograph of the victim, we find no abuse of discretion by the trial court in admitting the photograph. *People v Gayheart*, 285 Mich App 202, 226-228; 776 NW2d 330 (2009). The record reflects that the court deemed the photograph relevant to establishing the manner of the victim's death, and that the court carefully weighed the probative value of the photograph against any danger of unfair prejudice. MRE 401, 403. We cannot conclude that the court selected an outcome beyond the range of reasonable and principled outcomes when it admitted the autopsy photograph. *People v Feezel*, 486 Mich 184, 192 (opinion by Cavanagh, J.), 217 (concurrency by Weaver, J.); 783 NW2d 67 (2010).