

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
March 8, 2011

v

KAINTE DESHAWN HICKEY,  
  
Defendant-Appellant.

No. 285253  
Wayne Circuit Court  
LC No. 07-020825-FC

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

v

QUONSHAY DOUGLAS-RICARDO MASON,  
  
Defendant-Appellant.

No. 285254  
Wayne Circuit Court  
LC No. 07-020825-FC

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Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Following a joint jury trial, defendants Kainte Deshawn Hickey and Quonshay Douglas-Ricardo Mason were each convicted of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit murder, MCL 750.157a, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant Hickey was also convicted of felon in possession of a firearm, MCL 750.224f. Both defendants were sentenced to concurrent terms of life in prison for the first-degree murder and conspiracy convictions, and 285 months to 50 years for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant Hickey was sentenced to an additional concurrent prison term of 40 to 60 months for the felon-in-possession conviction. Defendant Hickey now appeals as of right in Docket No. 285253 and defendant Mason appeals as of right in Docket No. 285254. The appeals have been consolidated for this Court's consideration. We affirm in both appeals.

## I. FACTS AND PROCEEDINGS

Defendants' convictions arise from the fatal shooting of Bennie Peterson and the non-fatal shooting of Donteau Dennis during the early morning hours of September 28, 2007, in the city of Detroit. Defendants were tried jointly with codefendant Andre Lamont Jackson, who was also convicted of first-degree premeditated murder, conspiracy to commit murder, assault with intent to commit murder, and felony-firearm.<sup>1</sup>

Dennis was the primary prosecution witness at trial. Dennis testified that he was at the home of Bennie Peterson when defendant Mason came to the house and invited them to participate in a planned robbery of a drug purchaser at the Cabana Hotel. Mason told them that the purchaser would be carrying a large sum of money. Peterson and Dennis agreed to go, and they left with Mason in Peterson's van, with Mason driving. Codefendant Jackson followed them in a Jeep. According to Dennis, Jackson positioned himself in the Jeep to prevent Dennis from seeing another occupant in the Jeep.

Instead of driving to the hotel, Mason drove to Malcolm Street, where he instructed Dennis to purchase drugs from a drug house; informing him that the drugs would be used as bait in the planned robbery. As Dennis began walking toward the drug house, he noticed that Mason and Jackson had positioned their vehicles so that Peterson's van was trapped between the Jeep and another parked car. Hickey then approached Dennis, apparently having come from Jackson's Jeep. Dennis owed a \$50 drug debt to Hickey, who shot Dennis. During this same time, Dennis saw Mason and Jackson exit their vehicles carrying guns, and one or both of them fired into the van. Peterson died from multiple gunshot wounds. Dennis was shot several times, but fled to the backyard of a home nearby and survived.

Detroit Police Officer Frank Senter found Dennis lying in the backyard of that home. Dennis told Senter that Hickey had shot him over a drug debt, but did not say anything about Peterson, Mason, or Jackson. Over the next few days, Sergeant William Anderson interviewed Dennis at the hospital. Dennis reiterated that he was shot by Hickey, and also reported that Mason and Jackson had killed Peterson.

After Hickey and Mason were convicted, they both filed motions for a new trial. Mason submitted an affidavit in which he averred that he and another man, Hoseia "Man-Man" Turner, waited outside the Cabana Hotel while Peterson robbed a drug addict and Dennis stole a gun from the robbery victim's car. Mason claimed that when the group reconvened on Malcolm Street, Dennis and Peterson began arguing over the division of the robbery proceeds and struggled over the stolen gun. According to Mason, Dennis shot Peterson, jumped out of the van, and began to shoot at Mason and Turner, prompting Mason to shoot back in self-defense. Mason said that Jackson and Hickey were not present at the time of the shooting. Turner also submitted an affidavit that roughly corroborated Mason's version of events. Mason sought a

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<sup>1</sup> Codefendant Jackson's appeal in Docket No 285532 has been submitted along with these appeals for a decision by this Court.

new trial on the ground that defense counsel was ineffective for not calling Mason to testify to this version of events at trial. Hickey argued that Mason's affidavit and proposed new testimony was newly discovered evidence entitling him to a new trial. The trial court denied Mason's motion for a new trial, noting that Mason's trial counsel credibly testified that Mason's version of events was entirely different from the version that he related to counsel before trial. The court also denied Hickey's motion, concluding that Mason's proposed testimony was not newly discovered, but rather newly available evidence which Hickey did not attempt to secure before trial.

## II. DEFENDANT HICKEY'S APPEAL IN DOCKET NO. 285253

### A. SUFFICIENCY OF THE EVIDENCE

Hickey first argues that the evidence was not legally sufficient to support his convictions of first-degree murder and conspiracy to commit murder. We disagree.

In reviewing a challenge to the sufficiency of evidence, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Powell*, 278 Mich App 318, 320; 750 NW2d 607 (2008). This Court must give deference to the trier of fact and draw all reasonable inferences and make all credibility determinations in support of the jury's verdict. *Id.*

A conviction of first-degree premeditated murder requires evidence that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation requires "sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation can be established through "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The individuals must specifically intend to combine to pursue the criminal objective and the offense is complete upon the formation of the agreement. *Id.* at 345-346. Direct proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties. *Id.*

In this case, Hickey was convicted of Peterson's shooting death under an aiding and abetting theory. A person who aids or abets the commission of a crime may be convicted as if he directly committed the crime. MCL 767.39; *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). To be convicted of a felony under an aiding and abetting theory, the prosecution must prove three elements: (1) the crime charged was committed by the defendant or another 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 or encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).

Hickey does not dispute that Jackson and Mason could properly be found guilty of first-degree murder in connection with Peterson's shooting death. Accordingly, the first element of aiding and abetting is satisfied. Further, we disagree with Hickey's claim that the evidence was insufficient to establish either that he assisted or encouraged Jackson or Mason in committing the crime, or that he did not act with the intent or knowledge that Peterson would be killed. A jury could infer from Dennis's testimony that Jackson, Mason, and Hickey were acting in concert pursuant to a plan whereby Mason would entice Peterson and Dennis away from Peterson's home to a location where Hickey would kill Dennis, and Jackson and Mason would kill Peterson. The evidence supported an inference that Hickey was the passenger in Jackson's vehicle, and that Jackson attempted to conceal Hickey's presence from Dennis. The evidence also showed that Mason and Jackson parked their vehicles in a manner that prevented Peterson from driving away and that, after Dennis left Mason's vehicle, Hickey exited Jackson's vehicle and shot Dennis, while Mason and Jackson exited their respective vehicles and shot Peterson who was still inside the vehicle that Mason drove. A trier of fact could reasonably find beyond a reasonable doubt that Hickey aided and abetted Peterson's shooting death by shooting Dennis, thereby allowing Mason and Jackson to act without any threat of interference from Dennis, and that Hickey acted with knowledge of Mason's and Jackson's intent to kill Peterson. Accordingly, there was sufficient evidence to convict Hickey of first-degree premeditated murder under an aiding and abetting theory.

Furthermore, Dennis's testimony describing the coordinated actions of Hickey, Mason, and Jackson supported an inference that they were acting pursuant to a common plan to entice both Peterson and Dennis away from Peterson's home, and to then isolate and shoot them both. Accordingly, the evidence was also sufficient to support Hickey's conviction of conspiracy to commit murder.

## B. PROSECUTOR'S CONDUCT

Hickey next argues that the prosecutor's conduct denied him a fair trial. Because Hickey did not preserve his claims by objecting to the prosecutor's challenged conduct at trial, we review this issue for plain error affecting Hickey's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The prosecutor did not improperly argue facts not supported by the evidence when she asserted that Dennis had been shot eight times. Dennis testified on direct examination that he received eight gunshot wounds. Although defense counsel elicited on cross-examination that it was possible that a single bullet caused more than one wound, no medical testimony supporting this theory was presented. Because a prosecutor is permitted to draw reasonable inferences from the facts of the case, the prosecutor properly could rely on Dennis's testimony to argue that Dennis was shot eight times. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Accordingly, there was no plain error.

Hickey also argues that the prosecutor improperly accused defense counsel of fabrication and improperly denigrated counsel by labeling him a liar. A prosecutor may not personally

attack defense counsel, denigrate the defense, or question defense counsel's veracity by suggesting that counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). However, a prosecutor's comments must be considered in light of defense counsel's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Accordingly, a comment that might appear improper standing alone "may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Kennebrew*, 220 Mich App at 608.

Here, the prosecutor's "cheap novel" and "pure fiction" comments were made in the context of responding to defense counsel's entirely hypothetical theory that Dennis and Peterson were shot while trying to rob drug dealers, and that Dennis falsely accused Hickey to conceal Dennis's own illegal conduct. The prosecutor's comments were intended to convey that defense counsel's theory was not supported by any evidence. Under the circumstances, the comments did not constitute plain error.

Further, reversal is not required because of the prosecutor's statement that defense counsel told a "bal[d]-face" lie by accusing the prosecutor of coercing Dennis into lying by threatening to charge him with perjury. That statement was made in response to Hickey's counsel's comments that inaccurately tied Dennis's testimony to possible perjury charges. Although it may have been improper to characterize defense counsel's statement as a "bald-faced lie," considering the context in which it was made, the statement did not affect Hickey's substantial rights.

### C. TRIAL COURT'S CONDUCT

Hickey next raises a series of issues involving the trial court's conduct relative to some evidentiary rulings and jury instructions. He argues that the trial court displayed partiality in favor of the prosecution that undermined his constitutional right to present a defense.

To the extent that Hickey challenges certain evidentiary rulings, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). Claims of judicial misconduct are reviewed to determine whether the trial court's conduct or comments evidenced partiality that could have influenced the jury to the defendant's prejudice. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). However, unpreserved claims of error are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In the first part of this issue, Hickey challenges the trial court's admission of Sergeant Anderson's testimony regarding Dennis's statements during a hospital interview on September 30, a few days after the shooting. Anderson testified that Dennis identified "Kainte" (defendant Hickey) as the person who shot him. The trial court overruled Hickey's hearsay objection, concluding that Dennis's statements, although hearsay, qualified for admission as a dying declaration. We agree that the trial court erred in admitting Dennis's hospital statements. MRE 804(b)(2) provides that a statement is not excluded by the hearsay rule if the statement was "made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." This exception is

applicable only when the declarant is unavailable. Here, Dennis was an available witness at trial. Further, there was no foundation for a finding that Dennis believed that his death was imminent at the time he made the statement in the hospital. Thus, as plaintiff concedes, the trial court erred in admitting Dennis's hearsay statements to Sergeant Anderson under the dying declaration exception to the hearsay rule.

Nonetheless, we agree that the error was harmless because it is not more probable than not that the error was outcome-determinative. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). The testimony was cumulative of Officer Senter's testimony that Dennis identified Hickey at the crime scene as the person who shot him. It was also cumulative of Dennis's own trial testimony identifying Hickey as the shooter, which was subjected to extensive cross-examination by all three defendants. Under these circumstances, the erroneous admission of Dennis's hearsay statement at the hospital was harmless. *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010).

Hickey also contends that the trial court exhibited partiality by instructing the jury, contrary to the evidence, that Dennis was not part of a planned robbery. The instruction was given in response to statements by Jackson's and Hickey's counsels in their opening statements. In his opening statement, Hickey's counsel remarked in reference to Dennis, "What you have here is a story and it's a simple story, but it's told by a man who you'll find out the evidence will show is a thug, a thief, and a robber, who has told an ever changing story about what supposedly happened that night." Hickey's counsel also stated that the "sole witness by the prosecutor . . . always has said he's a stick up man." Counsel stated that the evidence would show that Dennis "went out there to make a drug heist robbery" that ended in the intended victims firing back at him and his co-felons.

Sergeant Anderson later testified that although Dennis had a prior conviction involving possession of a stolen vehicle, he had no record of any robbery-related convictions. The trial court overruled Mason's motion to strike Sergeant Anderson's testimony, ruling that it was admissible to respond to defense counsels' characterizations of Dennis in their opening statements. The trial court also commented, "Nobody was out committing any armed robbery." Later, during the court's jury instructions, the court instructed the jury as follows:

You are to focus on the testimony, the evidence that was admitted by the court. And as I explained to you in the beginning, emotion and personalities are to be left out completely because you deal with the facts and you must be objective. And the court advised you or will advise you again that any inflammatory remarks relating to the witness in the case as a robber, you will exclude that because that is not evidence.

The attorneys may bring to the jury's attention any previous convictions which involved theft, dishonesty and false statement but even then that is only used for you to impeach the credibility. You may consider that as it weighs on the credibility.

But there is no evidence whatsoever that there was any robbery committed or going to be committed. And by referring to the witness as a robber, of course,

is not evidence in the case. Ignore it. That is inflammatory. You look at the facts in the case because there is no evidence to sustain that. There might be conclusions as to what certain words mean. Conclusions have to be drawn by the jury. They cannot be drawn by the attorneys. And you may draw whatever conclusion you wish.

But those are merely arguments. That is not evidence and you are not to be inflamed or incited by the use of any inflammatory or excitable words because that is not evidence. And, again, remember that the arguments are the beginning or at the end is not evidence.

Because Hickey did not object to this jury instruction, any claim of instructional error is reviewed for plain error affecting Hickey's substantial rights. *Carines*, 460 Mich at 763. To the extent Hickey also argues that the trial court's instruction implicates his constitutional right to present a defense, because he did not raise this claim below, our review is also limited to plain error. *Id.*

Although a defendant has the constitutional right to present a defense, *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984), a trial court has broad discretion in matters involving the conduct of trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). However, a trial court may not pierce the veil of judicial impartiality by engaging in conduct or making comments that might unduly influence the jury and thereby deprive a defendant of his right to a fair and impartial trial. *Id.* at 308. When a trial court engages in excessive interference in the examination of witnesses, makes repeated rebukes and disparaging remarks to defense counsel, or demonstrates marked impatience in the presence of the jury, such conduct can deprive the defendant of a fair trial. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992).

We agree that it was improper for the trial court to suggest and instruct the jury that no robbery was intended on the day of the offense. Dennis admitted on direct examination that he agreed to go with Mason to "hit a lick," which referred to a robbery. This testimony indicates, as the prosecutor acknowledged, that Dennis, at least subjectively, intended to participate in a planned robbery. However, we disagree with Hickey's claim that the trial court's improper comment and instruction pierced the veil of judicial impartiality or otherwise affected Hickey's substantial rights. The gist of the instruction was not an effort to influence the jury against Hickey or to demonstrate partiality for Dennis, but rather to address what the trial court believed was the defense attorney's characterization of Dennis during opening statement as a thug, thief, robber, and "stick-up man." The trial court properly advised the jury that the lawyers' statements are not evidence and that the jury must disregard inflammatory statements not supported by any evidence. The trial court also properly observed that there was no evidence that Hickey or the other codefendants intended to commit a robbery, given that the evidence showed that, from their perspective, the purported robbery was a subterfuge to lure the two victims away from Peterson's house. In that regard, the trial court's comment and instruction that there was no evidence that a robbery was intended was not factually inaccurate. Against this backdrop, the trial court's conduct and instruction did not affect Hickey's substantial rights. Further, given the defense attorneys' characterization of Dennis in their opening statement, it was not an abuse of discretion for the trial court to allow Sergeant Anderson to testify that

Dennis had no prior criminal record for theft-related offenses. The testimony was responsive to an issue raised by defense counsel. See *Kennebrew*, 220 Mich App at 608.

#### D. INEFFECTIVE ASSISTANCE OF COUNSEL

Hickey next argues that a new trial is required because defense counsel was ineffective in several respects. Because the trial court did not conduct a *Ginther*<sup>2</sup> hearing with respect to Hickey's ineffective assistance of counsel claims, our review is limited to mistakes apparent from the record. *Powell*, 278 Mich App at 324. To establish ineffective assistance of counsel, Hickey must show that trial counsel committed errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* Hickey must also show that he was prejudiced by trial counsel's errors. *Id.* To establish prejudice, Hickey must show that "but for counsel's error there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable." *Id.* at 324-325, quoting *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Further, Hickey "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

We reject Hickey's argument that defense counsel was ineffective for failing to object to the prosecutor's conduct discussed in section II(B), *supra*. As explained previously, the challenged conduct either was not improper or was not prejudicial. Counsel is not required to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Hickey next argues that counsel was ineffective for failing to object when the prosecutor read into the record certain prior statements by Dennis and another witness, Yolanda Bishop, which Hickey argues were inadmissible hearsay. Even if the statements were not admissible, Hickey was not prejudiced by their admission. Dennis's statement was cumulative of his testimony that Hickey shot him because of a drug debt. Bishop made no mention of Hickey in either her trial testimony or her prior statement. Under these circumstances, Hickey cannot establish that he was prejudiced by counsel's failure to object to the statements.

Hickey also argues that his trial counsel was ineffective for failing to object to Dennis's hearsay testimony, during cross-examination by Jackson's counsel, that he heard about a prior incident in which Hickey approached Peterson's car with a gun. It appears from Dennis's initial testimony that he personally observed the incident. It was not until later that Dennis clarified that he only heard about the incident, at which point Jackson's counsel did not pursue the issue. Hickey's counsel had no apparent basis for objecting until the latter testimony was given. In this circumstance, the decision whether to object was a matter of trial strategy. Counsel reasonably may have concluded that Dennis's acknowledgement that he did not personally observe the incident diluted any prejudicial effect, and declined to object as a matter of strategy to avoid drawing attention to the matter. Hickey has not overcome the presumption of sound strategy.

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Last, the record does not support Hickey's assertion that trial counsel failed to obtain the investigative subpoena transcript. Rather, the record discloses that the prosecutor failed to disclose the transcript until trial. The trial court treated the matter as a discovery violation and fashioned a remedy by allowing the three defense attorneys the opportunity to review it. Hickey fails to explain how counsel was deficient in failing to obtain the transcript before trial, and fails to explain how he was prejudiced by the untimely production. He argues generally that counsel was not prepared to effectively cross-examine prosecution witnesses, but cites no material from the transcript that he contends could have been used on cross-examination. Accordingly, he has failed to establish ineffective assistance of counsel on this ground.

#### E. NEWLY DISCOVERED EVIDENCE

Hickey lastly argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence. We disagree. A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when the trial court's decision is outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Underlying questions of law are reviewed de novo, *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003), while a trial court's factual findings are reviewed for clear error, *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

MCR 6.431(B) provides that "the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." A defendant claiming that newly discovered evidence warrants a new trial must satisfy the following four-part test: "(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." *Cress*, 468 Mich at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). At issue here is whether the trial court properly concluded that Mason's post-trial statements exculpating Hickey were only newly available evidence, but not newly discovered evidence within the meaning of this rule.

This Court recently addressed this issue in *People v Terrell*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 286834, issued August 26, 2010), lv pending, in which a defendant similarly relied on a codefendant's willingness to provide post-trial testimony to argue that he was entitled to a new trial based on newly discovered evidence. This Court observed:

A majority of federal circuits have concluded that a codefendant's post-trial or post-conviction willingness to provide exculpatory testimony constitutes newly available evidence, not newly discovered evidence, and that if the defendant knew or should have known of the evidence prior to or during trial, the evidence was not discovered after trial, and a new trial is not warranted:

"[A] decided majority of circuits have held that, when a defendant is aware that his codefendant could provide exculpatory testimony but is unable to obtain that testimony because the codefendant invokes his privilege against self-

incrimination prior to and during trial, the codefendant's postconviction statement exculpating the defendant is not 'newly discovered evidence' within the meaning of Rule 33." [Terrell, slip op at 5, quoting *United States v Owen*, 500 F3d 83, 88 (CA 2, 2007).]

This Court noted that in several of the federal cases, the defendant seeking to use the codefendant's testimony was aware, or should have been aware, of the testimony at the time of trial. *Id.*, slip op at 7. The Court commented that policy considerations support the conclusion that a codefendant's post-trial testimony is not newly discovered where the defendant is aware of the testimony at the time of trial. *Id.* at 7. Such policy considerations involve the lack of reliability of a codefendant's post-trial statements and the concern that allowing a new trial to be granted on the basis of such unreliable evidence would encourage perjury. *Id.*, slip op at 7-8. The Court acknowledged that a defendant could be denied the benefit of a codefendant's potentially exculpatory testimony when the codefendant invokes his privilege against self-incrimination and refuses to testify. However, the Court stated that procedural remedies, such as granting a severance of trials or conferring limited immunity on a codefendant, could ameliorate this concern. *Id.*, slip op at 9. Citing *Owen*, 500 F3d at 91, the Court stated that "the pertinent inquiry is whether the defendant knew or should have known his codefendant could offer material testimony regarding the defendant's role in the charged crime." *Terrell*, slip op at 10.

Consistent with *Owen*, the trial court here considered whether Hickey knew or should have known before trial that codefendant Mason could have offered material, exculpatory testimony. The court found that there was no indication that Hickey made any attempt to secure Mason's purported testimony. The court further found that Mason's post-trial affidavit was inherently unreliable because his own trial counsel had "credibly and unequivocally testified that Mason's affidavit is not true." The court also observed that Mason had "waffled" about the contents of his affidavit because he subsequently signed a statement indicating that he was no longer willing to testify in accordance with the information submitted in the affidavit. Additionally, the court noted that Mason's affidavit conflicted with Jackson's statement to the police because Jackson admitted that he was at the scene. Hickey's counsel testified that he expected Mason to testify, and that he planned his case on the assumption that he would testify. Upshaw's testimony establishes that Hickey was aware at the time of trial, or should have been aware, that Mason had potentially exculpatory testimony to provide. Nonetheless, Hickey did not engage in due diligence to procure Mason's testimony. He simply assumed that Mason would testify, heedless of the possibility that Mason might change his mind, or that Mason's counsel might advise him not to testify. Under these circumstances, the trial court did not abuse its discretion in denying Hickey's motion for a new trial on the ground that Mason's purported post-trial testimony was not truly newly discovered.

Lastly, with respect to Turner's post-trial testimony, Hickey does not explain why Turner could not have been called at trial. There is no basis for concluding that his testimony was newly discovered. Thus, his testimony does not support Hickey's request for a new trial.

For these reasons, we affirm defendant Hickey's convictions and sentences in Docket No. 285253.

### III. DEFENDANT MASON'S APPEAL IN DOCKET NO. 285254

#### A. TRIAL COURT'S CONDUCT AND JURY INSTRUCTION REGARDING DENNIS'S CHARACTERIZATION AS A ROBBER

Like Hickey, Mason also argues that the trial court's comment and instruction that Dennis was not involved in any robbery was improper and denied him his constitutional right to present a defense. Our analysis of this issue in section II(C), *supra*, with respect to Hickey applies equally to Mason. For those reasons, the trial court's comment and instruction, although partially improper, did not affect the outcome and, accordingly, appellate relief is not warranted.

#### B. DENNIS'S CRIMINAL RECORD

Mason also argues that the trial court erred in denying his motion to strike Sergeant Anderson's testimony that Dennis had no criminal record for theft-related offenses. As previously discussed in section II(C), *supra*, the trial court did not abuse its discretion in allowing the testimony, given the defense attorneys' characterization of Dennis as a thief and a robber in their opening statements. Because the testimony, the accuracy of which is not disputed, was responsive to an issue raised by defense counsel, it was not an abuse of discretion to allow it. *Kennebrew*, 220 Mich App at 608.

### IV. DEFENDANT MASON'S STANDARD 4 BRIEF

Mason raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

#### A. SUFFICIENCY OF THE EVIDENCE

Mason argues that the evidence was insufficient to support any of his convictions.<sup>3</sup> We disagree. As previously discussed in Issue II(A), *supra*, the evidence at trial supported an inference that Jackson, Mason, and Hickey were acting in concert pursuant to a common plan to entice Peterson and Dennis away from Peterson's home to a location where they would be killed. The evidence showed that Mason drove Dennis and Peterson in one vehicle, and that Jackson followed them in a separate vehicle, accompanied by Hickey. When they arrived at Malcom Street, Mason asked Peterson for the gun he was carrying repeatedly, and Peterson ultimately complied. Mason and Jackson parked in a manner that prevented Peterson from driving away in the vehicle he was occupying. After Dennis left the vehicle Mason was driving, Hickey exited Jackson's vehicle and shot Dennis. Meanwhile, Mason and Jackson exited their respective

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<sup>3</sup> The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of felony-firearm are: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

vehicles and shot Peterson, who was still inside Mason's vehicle. Viewed in a light most favorable to the prosecution, the evidence was sufficient to allow the jury to find beyond a reasonable doubt that Mason was guilty possessing a firearm while committing first-degree premeditated murder in connection with Peterson's shooting death, and that Mason aided and abetted Hickey in assaulting Dennis with the intent to commit murder. The evidence was also sufficient to allow the jury to find that Mason conspired with Hickey and Jackson to murder Peterson and Dennis, thereby supporting his conviction for conspiracy to commit murder.

#### B. INEFFECTIVE ASSISTANCE OF COUNSEL

Mason next argues that he is entitled to a new trial due to the ineffective assistance of his trial counsel. Mason first contends that trial counsel was ineffective for failing to utilize the services of a court-appointed investigator, who Mason contends might have identified Turner as a potential witness before trial. Although the trial court conducted a *Ginther* hearing, Mason did not raise this issue at that hearing. Therefore, our review is limited to errors apparent from the record. *Powell*, 278 Mich App at 324.

At the *Ginther* hearing, Mason's trial counsel testified that she recalled the name "Man Man," which was Turner's nickname, but she did not recall how he was connected to the charged offense. Counsel was not asked whether Mason ever suggested calling Turner as a defense witness. There is no indication in the record that the appointed private investigator interviewed Turner or was ever advised that he might be a helpful witness. Mason's ineffective assistance of counsel claim is primarily based on Turner's testimony at Hickey's post-trial evidentiary hearing. Although Turner's post-trial testimony can be characterized as exculpatory with respect to Mason, it was inconsistent with the version of events that Mason conveyed to trial counsel before trial. Trial counsel cannot be deemed ineffective for failing to call a witness whose testimony would have conflicted with her own client's version of events.

The principal issue addressed at the *Ginther* hearing was whether Mason's trial counsel performed deficiently by advising Mason not to testify on his own behalf, or improperly refused to call Mason as a witness contrary to his express wishes. At the *Ginther* hearing, Mason and trial counsel presented conflicting testimony regarding the reasons Mason did not testify. According to defense counsel, Mason provided her with a version of events in which he claimed that he, along with Peterson and Dennis, set out to rob a drug house, but were fired upon by persons defending the house. Counsel explained that she recommended to Mason that he not testify because he would likely be viewed as an unsympathetic witness in the eyes of the jury. Defense counsel testified that she would have called Mason to testify if he insisted on doing so, but that he agreed with her advice not to testify. According to counsel, it was not until after the defense had rested that Mason expressed a desire to testify, by which time it was too late to do so.

Conversely, Mason testified at the *Ginther* hearing that he informed defense counsel that Dennis shot Peterson during an argument over the division of the robbery proceeds. He claimed that defense counsel informed him that he could not testify because he had not given a statement to the police. He also testified that counsel led him to believe that she would call him, and that he expected to be called as a witness, but counsel later told him it was "too late" to testify.

The trial court resolved the conflicting accounts by giving credence to defense counsel's testimony and finding that Mason's testimony was not credible. The trial court's findings of fact at a *Ginther* hearing are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Given the trial court's superior opportunity to determine issues of credibility, we defer to the trial court's credibility determinations. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). Here, defense counsel's testimony establishes that she recommended to Mason that he not testify as a matter of trial strategy, but that she would call him if he insisted on testifying contrary to her advice. However, Mason agreed with counsel's recommendation and, accordingly, was not called to testify. Counsel's testimony, if believed, establishes that counsel did not perform deficiently. The trial court expressly found that defense counsel's testimony was credible. Accordingly, giving deference to the trial court's credibility determination, we reject Mason's claim that counsel was ineffective.

Affirmed.

/s/ William C. Whitbeck  
/s/ Peter D. O'Connell  
/s/ Kurtis T. Wilder