

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 20, 2014

v

DAVID ANTHONY LEVACK,

Defendant-Appellant.

No. 311630
Iron Circuit Court
LC No. 11-009199-FH

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of: (1) first-degree murder under theories of both premeditated and felony murder, MCL 750.316(1)(a) and (b); (2) first-degree home invasion, MCL 750.110a(2); and (3) witness intimidation (involving committing or attempting to commit a crime), MCL 750.122(7)(c). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

A jury convicted defendant of murdering Joyce Johnson after breaking into her home outside Crystal Falls, allegedly to prevent her from testifying against him for larceny of Johnson's property. Defendant knew Johnson—he provided home healthcare for her husband until her husband's death in November 2009, and thereafter he continued to perform handyman services for Johnson. In December 2010, Johnson reported that defendant had stolen some of her jewelry, and identified a ring that defendant had pawned. The ring was inscribed with the initials of Johnson's and her husband's first names and the date of their marriage. Defendant was charged with the theft and the case was scheduled for trial on September 27, 2012. When Johnson failed to appear for trial, a "well-being" check was requested. The police found Johnson's body mostly submerged in water in her bathtub, and subsequently determined that she died of manual strangulation, probably on September 26, 2011.

II. ANALYSIS

On appeal, defendant makes the following assertions: (1) the prosecutor did not present sufficient evidence to sustain his convictions; (2) the trial court erred when it did not grant a mistrial because of jury misconduct; (3) the prosecutor violated his right to a fair trial by making reference to polygraph examinations; (4) the prosecutor forced him to comment on the credibility of another witness; (5) the trial court erred when it permitted the prosecution to introduce an

exhibit on cell-phone towers; and (6) the prosecutor committed misconduct. We address each issue in turn.

A. SUFFICIENCY OF THE EVIDENCE

“Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense.” *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The trial court denied defendant’s motion for a directed verdict at the close of the prosecution’s proofs. Accordingly, we “consider the evidence presented by the prosecution up to the time the motion is made . . . view that evidence in a light most favorable to the prosecution . . . and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.* (citations omitted). “ ‘Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime.’ Minimal circumstantial evidence is sufficient to prove the defendant’s state of mind.” *People v Portellos*, 298 Mich App 431, 444; 827 NW2d 725 (2012) (footnotes omitted), quoting *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

Here, defendant unconvincingly argues that the prosecution failed to present credible evidence to support his convictions. Apart from the fact that Johnson’s murder occurred shortly before she was to testify against defendant in his larceny trial, the prosecution provided ample circumstantial evidence that defendant broke into her home and murdered her. The evidence falls into three broad categories: (1) defendant’s location and behavior before the murder; (2) defendant’s location and behavior after the murder; and (3) defendant’s own statements regarding the murder.

1. DEFENDANT’S LOCATION AND BEHAVIOR BEFORE THE MURDER

Before the murder took place, a witness testified that defendant stated he was upset with the larceny charge against him, and that he was going to take care of the situation. Other witnesses said that on September 25, 2011, they saw defendant wearing camouflage pants and holding binoculars in a secluded and wooded area on private land near the victim’s home. Though defendant claimed he was bird-watching as part of a bet with a friend, the friend denied any such bet existed. Further, defendant’s bird-watching story conflicted with his initial account of the days in question, in which he denied being in Iron County during the relevant time period.

On September 26, 2011, the day before defendant’s scheduled larceny trial and the suspected day of the murder, defendant told others that he was going to Crystal Falls. Witnesses saw his car near the victim’s house at approximately 7:30 AM. His whereabouts during that day are unclear. Though he was supposed to play in a pool league at 7:00 PM that evening, he did not attend and told a league member that he was in Crystal Falls.

Defendant’s Tracphone records provided additional evidence of his location in and around Crystal Falls (and the victim’s home) on September 26, 2011, and also brought the testimony of defendant and his supportive witnesses into question. Though Lex Johnson testified that defendant was at his house from approximately 6:00 to 9:00 PM, defendant’s Tracphone

record indicated that defendant was mobile during this time period, moving about in the area between Iron Mountain, Florence,¹ and Crystal Falls. Defendant made a number of calls, including to the victim's line,² from 6:00 to 9:00 PM, and these calls bounced off cell-phone towers in Iron Mountain, Florence, and Crystal Falls. In addition, defendant used his cell phone to call Lex Johnson sometime in between 6:00 and 9:00 PM, which cast doubts on Johnson's claim that defendant was at his house during this time span. Further, another witness, Jamie Rose, stated that she saw defendant at Lex Johnson's house after 10:00 PM—not before. And Lex allowed defendant to stay at his home when the police were looking for defendant, which indicates he possessed an allegiance to or sympathy for defendant.

2. DEFENDANT'S LOCATION AND BEHAVIOR AFTER THE MURDER

After the authorities discovered Joyce Johnson's murder, defendant was hard to locate and seemed to be avoiding the police. Defendant again relied on Lex Johnson, and asked to stay with him on October 1, 2011. Lex eventually told the police that defendant was at his home, and gave them permission to enter the house. When no one answered, the police opened the door, announced their presence, and yelled for defendant, who did not respond. Eventually, defendant came up from the basement and identified himself. He told police that "I believe you were here to ask me about two court dates and about that night." Defendant claimed he had been in Dickinson County the whole weekend before Johnson's death, and not in Iron County. Defendant asked to stop speaking with police, so both parties agreed that defendant would come to the State Police post at 11:00 AM on October 3, 2011. Defendant then left Johnson's house and did not stay the night. A witness testified that around this time, defendant said he was a "fugitive."

Defendant's landlord testified that defendant returned home at approximately midnight on October 2, 2011, and stayed for about 15 minutes. At about the same time, a police officer learned that defendant was loading items into a taxi, possibly with the intent to flee. Defendant went to a Motel 6 in Kingsford with Jamie Rose, who testified that she and defendant had discussed leaving town together the night before to "[g]et away from this place." When the police arrived at the Motel 6, Rose asked defendant what was going on. She testified that defendant was livid and said something like the "bitch" was going to testify against him about stolen jewelry. Despite requests from the police, defendant refused to come out of the motel room, reiterating that he would be at the State Police post at 11:00 a.m. as planned. Rose testified that defendant called his mother, telling her he loved her and that if anything happened to remember that he loved her. Rose also stated defendant gave her his Bridge card, and told her would contact her later.

As he came out of the motel room, the police asked defendant to halt, which he did, with his back to the officers. Defendant then reached and turned, pointed a knife at the detectives, and

¹ Florence is located in Wisconsin.

² Defendant used Star 67 to conceal his phone's number from a caller-identification system when he called the victim's number. This was the last known call to the victim's telephone.

then held it to his throat, and said: “Is this what you want?” He then stated he was not going to give them his life and that they would have to take it. The police drew their guns and ordered defendant to drop his knife. Though defendant sheathed the weapon for a time, when additional police officers arrived, defendant pulled out the knife again, threatened the officers, and lunged at them, stating “[y]ou’re going to have to shoot me.” Afterwards, defendant again sheathed the knife, but brought it out a third time and threatened the officers once more. The police then tased him. Defendant had approximately \$1,000 in his wallet.

3. DEFENDANT’S STATEMENTS

Prior to his arrest, witnesses testified that defendant made a number of incriminating statements about the victim’s murder. Brian Krause stated that, around the time of the larceny trial, defendant remarked that there were “no marks left” and that “[he] can’t believe [he] went back to that house again and at least there aren’t any marks” “on the neck.”³ In addition, a number of witnesses testified that on the morning of his scheduled larceny trial,⁴ defendant appeared “like a statute” when he was informed of the victim’s murder.⁵ One witness also stated that during that afternoon, defendant laughed and said they could not find “that lady” to testify against him.

At his post-arrest police interview, defendant was inconsistent with dates and times, but admitted that he had been at the victim’s home (in violation of a court order) earlier in September. He also told police that he had been in the area of the victim’s home on September 19 and 20, 2011 to bird-watch. Apparently defendant returned to the area on September 25, but denied being on the victim’s land. Defendant’s veracity on his whereabouts in and around the victim’s property was called into doubt by the discovery of a Powerade bottle about 65 to 75 feet from the victim’s home—an area where defendant denied being—which contained defendant’s DNA. The bottle was not discolored from moisture or sunlight, indicating it had been placed there recently. Defendant stressed that on September 26, which he acknowledged as the alleged date of the murder, he was with Lex Johnson.

After the interview, the police took defendant to the hospital for a mental health examination. While waiting, he asked the officers why they did not shoot and kill him, and whether he would have had to throw the knife for this to occur. He also asked one officer if he

³ Krause did not tell police this information in his initial interview. He explained that he had been on a “drug bender” and that his memory had improved since getting sober. He was in jail awaiting trial on a felony, but testified that while he initially asked for a deal in exchange for this information, he did not receive any deal. A number of Krause’s friends testified that he was not always truthful.

⁴ September 27, 2011.

⁵ Defendant’s attorney for the larceny case testified that he told defendant of Johnson’s murder before the judge’s announcement, and that he instructed defendant not to make any outward display of emotion.

had ever killed anyone, and mentioned that he believed in reincarnation. Defendant's behavior prior to the interview was erratic and involved bouts of crying.

4. SUMMARY

When viewed together in the light most favorable to the prosecution, the evidence is more than sufficient to sustain defendant's convictions. Defendant had a motive to murder the victim: to keep her from testifying against him in the larceny case. Shortly before the murder, he violated a court order and went on property near defendant's home, which supports a legitimate inference that he conducted surveillance on the victim or her house. The Powerade bottle with defendant's DNA that was found 65 to 75 feet from the victim's house disproved defendant's claim that he was never in this area. It also established that he was near the crime scene, and its placement on top of leaves and its lack of discoloration suggested that it was placed there around the time of the murder. Defendant's Tracphone records indicate his movement in and around Crystal Falls on the alleged day that the victim's murder occurred. Further, his evasion of the police, statements to Rose, and the \$1,000 on his person suggest that defendant intended to flee, which could indicate his guilt. See *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). And defendant's violent and unstable actions during his confrontation with the police suggest suicidal ideation, which has also been recognized as evidence of consciousness of guilt. See *Unites States v Cody*, 498 F3d 582, 591 (CA 6, 2007).

Moreover, defendant's own statements cast doubt on his truthfulness and innocence. His remarks to Krause regarding the absence of leaving no marks on the victim's neck were incriminating. Although Krause's own truthfulness is debatable, credibility is a question for the jury. *People v Harrison*, 283 Mich App 374, 377–378; 768 NW2d 98 (2009). And defendant gave inconsistent statements on his whereabouts during the weekend before the offense, first saying he was in Dickinson County and then admitting he was near the victim's home. Inconsistent statements can also indicate consciousness of guilt. *Unger*, 278 Mich App at 225–226.

In an effort to show his innocence, defendant asserts that there is no physical evidence placing him inside the victim's home at the time of the murder, and posits that there are other individuals who might have had a motive to kill the victim. However, the prosecution

need not negate every reasonable theory consistent with innocence. *People v Konrad*, 449 Mich 263, 273, n 6; 536 NW2d 517 (1995). Instead, the prosecution is bound to prove the elements of the crime beyond a reasonable doubt. It is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury "in the face of whatever contradictory evidence the defendant may provide." [*People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).]

In sum, when the evidence is viewed in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant broke into Joyce Johnson's home and killed her to prevent her from testifying at his larceny trial. Accordingly, the evidence was sufficient and defendant was not denied due process.

B. JURY'S CONDUCT

A trial court's decision on a motion for a mistrial is reviewed for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009).

A trial court's denial of a motion for a mistrial based on juror misconduct is an abuse of discretion only where the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment. A new trial will not be granted if no substantial harm was done thereby to the defendant, even though the misconduct may merit a rebuke from the trial court if brought to its notice. [*People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).]

The only constitutional issue on which defendant preserved his appeal is the right of confrontation. Preserved constitutional issues are reviewed de novo; unpreserved constitutional claims are reviewed for plain error affecting the defendant's substantial rights. *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009).

“[A]s a matter of law, clearly established Supreme Court precedent requires that a criminal defendant be afforded the right to confront the evidence and the witnesses against him, and the right to a jury that considers only the evidence presented at trial.” *Doan v Brigano*, 237 F3d 722, 733 n 7 (CA 6, 2001) (citations omitted), overruled on other grounds by *Wiggins v Smith*, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Accordingly, a jury that considers “extraneous facts not introduced in evidence” might violate defendant's 6th Amendment right to confrontation. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). To show that “extrinsic influence was an error requiring reversal,” defendant must demonstrate: (1) “the jury was exposed to extraneous influences”⁶; and (2) those “extraneous influences created a real and substantial possibility that they could have affected the jury's verdict.” *Id.* at 88–89. To show such a possibility, defendant generally needs to demonstrate that “the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.” *Id.* at 89.⁷

⁶ The Michigan Supreme Court noted: “the inquiry whether the extrinsic influences could have affected the jury's verdict is an objective inquiry.” *Budzyn*, 456 Mich at 89, n 10.

⁷ The Michigan Supreme Court also stated that a court is allowed to consider “the following factors in determining whether the extrinsic influence created a real and substantial possibility of prejudice”:

(1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. [*Budzyn*, 456 Mich at 89, n 11 (citations omitted).]

Here, defendant asserts that the trial court erred when it refused to grant him a mistrial, because his 6th Amendment rights were supposedly violated when a juror used Google Maps during deliberations to confirm the existence of a shortcut to the victim's home.

However, there is no "real and substantial possibility" that exposure to this alleged extraneous influence affected the jury's verdict. The trial court discovered this issue during the proceedings, and was informed that the jurors were not using the Google Maps information. Nonetheless, the court advised the jury that the use of Google was contrary to its instructions and that the jury was not to use the Google information in any way. The court also reinstructed the jury not to conduct original research and investigations, and then allowed the jury to resume deliberations. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008).⁸

Because the jury expressly noted its non-consideration of the Google Maps information and the trial court gave a timely instruction to disregard this extrinsic evidence, defendant fails to demonstrate that there was a "real and substantial possibility" extrinsic evidence affected the jury's verdict. Accordingly, the trial court properly denied defendant's motion for mistrial.

C. POLYGRAPH REFERENCES

"[R]eference to taking or passing a polygraph test is error." *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). A brief, isolated comment regarding a polygraph, however, does not require reversal, and the court uses various factors to determine whether reversal is warranted in such an instance, including:

- (1) whether defendant objected and/or sought a cautionary instruction;
- (2) whether the reference was inadvertent;
- (3) whether there were repeated references;
- (4) whether the reference was an attempt to bolster a witness's credibility; and
- (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." [*Id.* at 98 (citations omitted).]

Here, defendant argues that: (1) the prosecution violated his right to a fair trial by making reference to polygraph examinations; and (2) the trial court abused its discretion when it failed to grant a mistrial on this basis. Defendant's assertion stems from a recording of a police officer's interview with Brian Krause, which defendant's attorney introduced. On the recording, Krause said he would take a polygraph test. On cross examination, the officer stated that he did not, in fact, give Krause a polygraph. The prosecutor then asked the police officer if any other individuals involved in the case were offered polygraphs. The officer stated that two other people were offered polygraph tests. When the prosecutor attempted to press the point, defendant objected and the court did not allow the police officer to answer.

⁸ Moreover, to the extent any violation of defendant's 6th Amendment rights occurred, the jury's express disregard of the Google material and the court's instruction that they disregard this extraneous evidence establishes that the Google information was harmless beyond a reasonable doubt. See *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967).

After this exchange, defendant moved for a mistrial, and argued that: (1) the initial mention of the polygraph in the recording was in passing; (2) he did not open the door to the general subject of polygraphs; and (3) the prosecutor implied two individuals received polygraphs. The trial court denied the motion, and reasoned that the information elicited would not cause undue prejudice. Nonetheless, the court instructed the jury to disregard any mention of a polygraph.

Applying the *Nash* factors to this case, it is clear that the trial court did not abuse its discretion when it denied defendant's motion for a mistrial, and that defendant's right to due process was not violated. Though defendant objected to the prosecutor's line of questioning and the prosecutor's remark was intentional, the exchange was a single, isolated comment that occurred during the course of a 10-day trial. There is no indication that the prosecutor intended to use the question to bolster the credibility of the individuals who were offered the polygraphs. There is little if any indication that the jury viewed these individuals as credible *because of* the officer's statement that they were offered polygraph examinations. Most importantly, the officer's testimony only mentioned that a polygraph had been offered to certain individuals—not that a test had been given, or the results of a test. Any implication that the police gave polygraphs or that the named individuals passed them was ambiguous at best. And, in any event, the trial court instructed the jurors to disregard all references to polygraphs, and jurors are presumed to follow instructions. *Petri*, 279 Mich App at 414.

Accordingly, the trial court properly denied defendant's motion for a mistrial, and defendant's due process rights were not violated.

D. COMMENTS ON WITNESS CREDIBILITY

“It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury.” *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, if a defendant attempts to undermine a witness by questioning the veracity of his claims, the defendant opens the door to questions on the veracity of the witnesses' claims. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). A trial court's decision on a motion for mistrial is reviewed for an abuse of discretion. *Waclawski*, 286 Mich App at 708.

Here, defendant asserts that the prosecutor impermissibly asked him to comment on the credibility of other witnesses. Specifically, he claims that his remarks during cross examination on the accuracy of other witnesses' statements that the victim was afraid of him (which he denied) were improper statements the prosecutor forced him to make by pursuing this line of questioning.

As the trial court noted, what defendant ignores is that he opened the door to these questions through his own statements on the stand, when he told the jury the victim was not “afraid of [him] like everybody wants you to believe.” This remark directly contradicted the testimony of other witnesses and attacked their credibility in the process. The prosecutor's questions were thus a proper response to defendant's statement. The weakness of defendant's claim that the prosecutor acted improperly is further underlined by the fact that the trial court, after the line of questioning at issue, instructed the jury that lawyer's questions are not evidence.

Defendant was therefore not asked to impermissibly comment on the credibility of other witnesses, and the trial court correctly denied his motion for mistrial on the issue of the prosecutor's questions.⁹

E. CELL TOWER EVIDENCE

“Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case.” *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). “[W]hen evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert’s testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event.” *Id.*

Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court’s decision to admit demonstrative evidence. However, as with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice. [*Unger*, 278 Mich App at 247 (citations omitted).]

A decision regarding whether evidence is admissible is within the trial court’s discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

In this case, defendant asserts that an exhibit showing the location of cell-phone towers in Iron Mountain, Florence, and Crystal Falls did not show scale, and demonstrated that the coverage ranges of the towers were larger than they actually were. This claim is completely frivolous. The exhibit in question appears to have been a helpful visual aid that showed the physical path of phone calls made by the subject number. And it does not seem as if the prosecutor argued that the depicted ranges of the cell-phone towers were representative of their actual ranges. To the extent that the exhibit depicted inaccurate ranges, defense counsel was able to say so.

Accordingly, the trial court did not abuse its discretion when it admitted the exhibit as a demonstrative aid, and defendant’s right to a fair trial was not violated.

F. ALLEGED PROSECUTORIAL MISCONDUCT

⁹ Defendant also suggests that the prosecution violated due process when it sarcastically asked him if all the witnesses were lying except him. He fails to develop this argument, however. “A party may not merely announce a position and leave it to us to discover and rationalize the basis for the claim.” *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). And in any event, while this was a question and not closing argument, a prosecutor is not limited to using the blandest of all possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant argues that several instances of prosecutorial misconduct violated his right to due process, despite the fact that he never objected to the prosecutor's conduct at trial. To preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant also suggests that his attorney's non-objection constituted ineffective assistance of counsel, which, again, is a claim he failed to raise below.

Absent a contemporaneous objection and request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger*, 278 Mich App at 235. Review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Duncan*, 402 Mich 1, 15–16; 260 NW2d 58 (1977); *People v Williams*, 265 Mich App 68, 70–71; 692 NW2d 722 (2005). To the extent that a claim of prosecutorial misconduct is a constitutional issue, it is reviewed de novo, but a trial court's factual findings are reviewed for clear error. *Brown*, 279 Mich App at 134.

Regarding the ineffective assistance claim, review is precluded “unless the appellate record contains sufficient detail to support the defendant's claim.” *People v Sabin (On Second Remand)*, 242 Mich App 656, 658–659; 620 NW2d 19 (2000). If it does, the Court must determine whether counsel's performance fell below an objective standard of reasonableness and if so, whether a different result would have been reasonably probable. *People v Armstrong*, 490 Mich 281, 289–290; 806 NW2d 676 (2011); *Strickland v Washington*, 466 US 668, 687–688, 694–696; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

While defendant's argument of prosecutorial misconduct is based on 15 separate instances, his claims are united by their frivolity and total lack of legal support for the assertion that they constitute misconduct.¹⁰ Because he is unable to demonstrate that the prosecutor committed misconduct in the incidents of which he complains, defendant does not show that his due process rights were violated, or that his attorney was ineffective for not objecting to prosecutorial misconduct that was not objectionable.

III. STANDARD 4 BRIEF

Defendant raises several additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. SEIZURE AND IDENTIFICATION OF AUTOMOBILE

¹⁰ Defendant even claims that the prosecution committed misconduct in its exhaustive development of latent-print testimony—despite the fact that the print evidence was favorable to defendant.

“A warrantless seizure of an automobile is reasonable if there is probable cause that an automobile contains evidence or fruits of a crime plus exigent circumstances.” *United States v Swanson*, 341 F3d 524, 531 (CA 6, 2003) (citations omitted).¹¹ “The mobility of automobiles . . . creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.” *California v Carney*, 471 US 386, 391; 105 S Ct 2066; 85 L Ed 2d 406 (1985) (citations omitted). We review the trial court’s factual findings for clear error and review its application of the constitutional standard to those facts de novo. *People v Elliott*, 494 Mich 292, 300–301; 833 NW2d 284 (2013).

Here, defendant wrongly asserts that the trial court erred when it denied his motion to suppress evidence arising from the seizure and identification of his vehicle. The police seized defendant’s car on October 1, 2011, because they had probable cause to believe that the vehicle and its contents would be circumstantial evidence of the commission of a crime.¹² And “exigent circumstances” existed: the seizure involved a car, and testimony that identified the car as defendant’s¹³ tended to establish that defendant was in the area of the victim’s home two days before the murder took place. While this did not prove anything standing alone, the timing of defendant’s presence coupled with the timing of the larceny trial and the victim’s death, as well as other evidence discussed above, the car had a tendency to establish that defendant was the killer. See LaFave, *Search and Seizure*, § 7.2(b), at 559–560 (courts have generally not required law enforcement to mitigate the risk of lost evidence by guarding a vehicle while obtaining a warrant). Accordingly, the seizure of the automobile did not violate defendant’s constitutional rights.

B. MOTION TO SUPPRESS DEFENDANT’S STATEMENTS

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his 5th Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); and *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). “[W]hether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion.” *Daoud*, 462 Mich at 635. “[D]etermining whether a suspect’s waiver was knowing and intelligent requires an inquiry into the suspect’s level of

¹¹ But see *Robinson v Cook*, 706 F3d 25, 31 n 4 (CA 1, 2013), in which the court questions whether exigent circumstances should be a requirement.

¹² The police delayed in obtaining a warrant to search the vehicle because they did not want the warrant to become stale while awaiting the availability of someone with experience in handling components of a methamphetamine lab. The search warrant was obtained on October 10, 2011, and executed on October 11, 2011. In the interim, testimony identified the car as defendant’s vehicle.

¹³ We have found no authority to suggest that it was impermissible to show the seized vehicle to others before a warrant was obtained. Defendant simply asserts that this was improper but cites no case law for that proposition. A party may not leave it to this Court to search for authority to sustain or reject its position. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Further, merely allowing a witness to look at an object is neither a search nor a seizure.

understanding, irrespective of police behavior. . . . [T]o establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.” *Id.* at 636–637 (citations omitted).

Here, defendant says that his medical and mental status on October 3, 2011 precluded a knowing and voluntary waiver of his 5th Amendment rights. Specifically, he claims his diabetes may not have been under control and that he was mentally ill. The record, however, belies these assertions—the evidence showed that defendant’s blood sugar was normal (indeed, defendant confirmed during the police interview that it was at an acceptable level). Moreover, his mental status did not appear to be impaired in a way that would have precluded a knowing and intelligent waiver. When read in its entirety, the certificate issued by the hospital after defendant’s mental evaluation stated that defendant was depressed and needed treatment—not that defendant suffered from any condition or illness that would have had a significant effect on his ability to make a rational decision about waiver. Further, the audio recording of the police interview indicates that defendant was stable and that he was more than capable of making a knowing and intelligent waiver; this was evidenced in part by the fact that he withdrew the waiver during the interview, and then changed his mind and began talking once again. Accordingly, the trial court properly denied defendant’s motion to suppress his statements.

C. VENUE

Generally, a defendant is to be tried in the county where the crime was committed. *People v Houthoofd*, 487 Mich 568, 579; 790 NW2d 315 (2010). However, “[t]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Unger*, 278 Mich App at 254, quoting *Irvin v Dowd*, 366 US 717, 722; 81 S Ct 1639; 6 L Ed 2d 751 (1961). Thus, the defendant is entitled to a change of venue when a panel of impartial jurors cannot be found. In *People v Jendrzejewski*, 455 Mich 495, 500–501; 566 NW2d 530 (1997), which, like the present case, involved a small community, the Court stated:

Federal precedent has used two approaches to determine whether the failure to grant a change of venue is an abuse of discretion. Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice. *United States v Angiulo*, 897 F2d 1169, 1181-1182 (CA 1, 1990).

Jendrzejewski distinguished between “factual publicity” and “invidious or inflammatory” coverage. *Jendrzejewski*, 455 Mich at 504. Further, the Court held that in evaluating whether a defendant was deprived of a fair trial because of pretrial publicity, the reviewing court is required to consider the totality of the circumstances and determine whether the pretrial publicity was so unrelenting and prejudicial in nature that “the entire community [is] presumed both exposed to the publicity and prejudiced by it.” *Id.* at 501. “When a juror, although having formed an opinion from media coverage, swears that he is without prejudice and can try the case impartially according to the evidence, and the trial court is satisfied that the juror will do so, the juror is

competent to try the case.” *People v Cline*, 276 Mich App 634, 639; 741 NW2d 563 (2007) (citation omitted).

In this case, defendant says that the trial venue should have been changed because of pretrial publicity¹⁴ and a tainted jury pool. Neither claim is convincing. The voir dire indicated that the media coverage was limited to “highlights” and did not cover the case in great detail. Nor did anyone suggest the media coverage was extensive. Accordingly, the coverage itself does not appear to be of the kind that would give rise to a concern about a tainted pool. And the record contains no evidence that the jury pool was tainted by the media coverage.¹⁵ In sum, defendant cannot show actual bias in the community that was caused or related to pretrial publicity.¹⁶

In addition, defendant cannot show community bias that could be implied from a high percentage of the venire who admitted to a disqualifying prejudice. Defendant seems to base his argument on the venire’s familiarity with the victim, law enforcement witnesses, or the area of the crime. However, most of the venire indicated that they did not know defendant, the lawyers, or any witnesses—or that knowing defendant, the lawyers, or the witnesses would not affect judgment of their testimony, and had not caused them to form an opinion. While there were a number who admitted to a disqualifying prejudice, the voir dire was completed in a day and a jury apparently satisfactory to all was seated. Thus, defendant fails to show community bias that deprived him of a fair trial.¹⁷

D. CHALLENGES FOR CAUSE

This Court uses a four-part test “to determine whether an error in refusing a challenge for cause merits reversal.” *People v Lee*, 212 Mich App 228, 248–249; 537 NW2d 233 (1995).

There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*Id.*]

¹⁴ Specifically, defendant states only that there was considerable publicity and media coverage, not that there was invidious or inflammatory coverage.

¹⁵ Some, but by no means all, on the venire indicated that they had heard about the case in the media and from others. However, they either indicated that they had not formed an opinion about the case or would be able to put the reports aside, or they were excused for cause.

¹⁶ It is noteworthy that 7 of the 12 potential jurors that defendant names as having had prior knowledge about the case were dismissed through peremptory challenges, and that defendant did not exercise his remaining peremptory challenges on the remaining five.

¹⁷ Defendant’s numerous other complaints about the jury’s composition are baseless, and do not give rise to a concern about juror impartiality.

Defendant asserts that he was forced to use up his peremptory challenges in part to excuse jurors who should have been dismissed for cause, and that the remaining jurors were biased and unfair, violating defendant's 5th Amendment right to due process. However, defendant did not exhaust his peremptory challenges. Were we nonetheless to conclude that any of the denials for cause were improper, defendant's failure to exhaust peremptory challenges precludes relief.

E. EVIDENCE OF PRIOR BAD ACTS

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

“To be admissible under MRE 404(b), bad-acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice.” *People v Kahley*, 277 Mich App 182, 184–185; 744 NW2d 194 (2007).

Here, defendant says that evidence of the larceny case, a bond violation, his behavior at the Motel 6, and his methamphetamine use were erroneously admitted. This assertion is inaccurate; evidence of each was offered for a proper purpose, was relevant, and had a probative value that was not substantially outweighed by unfair prejudice. The larceny charge against defendant involved the theft of the victim's jewelry, and a ring bearing the victim's initials that defendant had pawned—evidence that showed the victim's testimony would have been likely to lead to defendant's conviction for larceny. Defendant's bond violation involved his presence in the area of the victim's home—evidence that made it more likely he was there as part of preparation or a plan to murder Johnson and that he was not simply bird-watching, as he arguably would have been less likely to violate the bond for something so frivolous. The Motel 6 incident was not offered to show that defendant committed the murder. Rather, defendant's violent behavior and statements that he wanted to commit “suicide by cop” was evidence that showed consciousness of guilt.

The trial court deferred ruling on the prosecutor's motion in limine with respect to evidence of defendant's methamphetamine use. This evidence was revealed through Jamie Rose and Krause's testimony, without objection. Another witness testified, again without objection, that he was meeting defendant at the Motel 6 to pick up some pseudoephedrine; defense counsel then established that the witness intended to use the pseudoephedrine to manufacture methamphetamine. Because the trial court deferred the determination and defendant failed to object when the evidence was presented, we review for plain error affecting a substantial right. MRE 103(d). In *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (footnote

omitted), the Court, citing and quoting *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), stated:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. 507 US at 731-734. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*, p 734. “It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.* Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affected the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” 507 US at 736-737.

Here, the prosecutor stated that evidence of defendant’s methamphetamine use would be admissible because it involved a criminal transaction, and would have had an effect on defendant’s perceptions. The prosecutor also theorized that defendant’s use of methamphetamine was relevant to defendant’s motive to murder Johnson because he wanted to avoid methamphetamine withdrawal in prison. In any event, the prosecution only made a single fleeting reference to methamphetamine in its closing argument. Defendant fails to show that this evidence affected the outcome of the proceedings and it is doubtful that the jury convicted him of murder because he used methamphetamine. Accordingly, the trial court’s admission of this evidence was not error, and even if the reference to methamphetamine had been error, it is harmless.

F. RIGHT TO ASSIST

A defendant is entitled to “a fair opportunity to consult with counsel and prepare his defense.” *People v Henley*, 26 Mich App 15, 25; 182 NW2d 19 (1970). Here, defendant claims that he was denied the right to assist in his defense because he was not given a laptop computer to review evidence. He did not move for an adjournment or otherwise indicate that he needed more time to review evidence. Accordingly, this issue is not preserved and review is for plain error affecting a substantial right. *Carines*, 460 Mich at 763–764.

Defendant fails to show that access to a laptop computer is part of his entitlement to a “fair opportunity to consult with counsel and prepare his defense.” Nor has he shown that his counsel’s ability to prepare a witness and exhibit list was in any way hampered by defendant’s lack of access to a laptop computer before March 9, 2011. Defendant indicates that he had only 10 days after this date to submit the witness and exhibit list, yet the register of actions indicates that it was filed five days later on March 13, 2012. It therefore does not appear that the laptop was necessary for this purpose, or that he was denied a fair opportunity to prepare for his defense.

G. INEFFECTIVE ASSISTANCE OF COUNSEL¹⁸

“Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel’s performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel’s deficient performance, a different result would have been reasonably probable. [*Armstrong*, 490 Mich at 289–290 (footnotes and citations omitted).]

Here, defendant’s argument that he did not receive effective assistance of counsel is simply a list of grievances against his attorney, and in every instance he either fails to establish a factual predicate for his claim, or does not show that his cause would have been advanced had his attorney acted as defendant claims his attorney should have. He also fails to demonstrate that any of the actions or inactions identified would have had any effect on the outcome of his trial. Accordingly, he has failed to establish ineffective assistance of counsel.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck

¹⁸ In his requested relief, defendant asks for a remand to determine any ineffective assistance of counsel issues not properly preserved. However, MCR 7.211(C)(1) provides that a motion to remand must be filed within the time for filing the appellant’s brief. Moreover, it must be accompanied by an affidavit or offer of proof regarding the facts to be established. Defendant has failed to comply with this rule. Further, he failed to move for a new trial or an evidentiary hearing on any of these issues in the trial court, as is also required by MCR 7.211(C)(1). Accordingly, review is precluded “unless the appellate record contains sufficient detail to support the defendant’s claim.” *Sabin*, 242 Mich App at 658–659.