

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELIUS ALDEN BROWN,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 239244

Ingham Circuit Court

LC No. 01-076755-FC

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 600 to 900 months' imprisonment for the murder conviction, and a consecutive two-year term for the felony-firearm conviction and appeals as of right. On appeal defendant assigns a plethora of errors including the erroneous admission of evidence of drug trafficking, prosecutorial misconduct, erroneous admission of demonstrative evidence, error in the instruction of the jury, error in the trial court's denial of defendant's motion for a new trial based on the fact that the verdict was against the great weight of the evidence, and finally ineffective assistance of counsel. The record does not support any of defendant's challenges and we affirm.

I. Facts

Defendant's convictions arise from the shooting death of Shemika Rogers, who was shot in her head, chest, and arms, while inside her Range Rover vehicle. According to the prosecutor's theory of the case, defendant shot Rogers while attempting to ambush Kevin Kennard, in connection with a drug debt owed to Kennard by Michael Jones. Defendant was tried jointly with Michael Jones' brother, Sam Jones, who is defendant's cousin.¹ The prosecutor presented evidence that Michael Jones owed Kennard \$1,600 for cocaine that Kennard had supplied to Jones. Kennard's demands for payment went unsatisfied and Kennard eventually looked to Sam Jones for repayment. According to witnesses, acquaintances of defendant and codefendant Jones, namely, Darrian Mendenhall, Amber Speed, and Patrick Gentry, spotted

¹ Sam Jones was also convicted of second-degree murder under an aiding and abetting theory.

Kennard riding with Rogers in her vehicle. They followed Kennard to the Homestead Apartments in East Lansing while telephoning defendant and Sam Jones to alert them to their location. The latter pair arrived at the apartment complex and encountered Rogers, who had remained in her vehicle while Kennard went to an apartment on an errand. Rogers' young son was also in the vehicle. According to witnesses, following a confrontation, defendant shot Rogers with a long gun.

II. Evidence of Drug Trafficking

Defendant argues that the trial court erroneously allowed the prosecutor to present testimony that the dispute that led to the violent encounter was a drug debt. Defendant argues that the origin of the underlying dispute was not relevant, and further, that any relevance the evidence did have was substantially outweighed by the danger of unfair prejudice. We disagree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Relevant evidence is evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence). MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. "[U]nfair prejudice" exists only when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

We agree with the prosecutor that the challenged evidence was relevant to motive and to explain the circumstances that led to the encounter with Rogers. As the prosecutor explained in closing argument:

You looked into a life-style that in some ways was attached to drugs, the sale and use of drugs, a black market economy, and the way the people that lived in that black market economy deal with each other. Drug deals are not subject to small claims court. You can't sue anybody for a bad debt. You can't get a lien on their car or their house. You can't get a promissory note in order to secure those kinds of obligations.

In a murder case, evidence of a defendant's motive is always relevant. *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001); *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). Moreover, a jury is entitled to hear the "complete story" of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Evidence of additional criminal transactions is admissible "when so blended or connected with the crime of which [the] defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Id.*, quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964).

Although defendant complains that disclosure of the fact that the origin of the underlying debt was drug-related was unduly prejudicial, the probative value of the evidence was high. As the trial court observed, the source of the debt was necessary to explain why the parties resorted to violent self-help conduct to recover the debt. The court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403.

Nor are we persuaded by defendant's claim that the evidence should have been excluded because the "defense did not know, prior to trial, that the issue of drugs would be broached." It is apparent that defendant had actual knowledge that a drug debt was involved. As noted by the trial court, this case did not truly involve a question of unfair ambush. See *People v Taylor*, 159 Mich App 468, 486-487; 406 NW2d 859 (1987).

For these reasons, the trial court did not abuse its discretion in admitting the challenged evidence.

III. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial because of several instances of misconduct by the prosecutor. We disagree.

A. Use of False Testimony

Defendant first asserts that the prosecutor deliberately elicited false testimony from witnesses at the preliminary examination, or alternatively, failed to disclose the falsity of the testimony when it subsequently became known, before trial, during immunity discussions with the witnesses.

Generally, evidentiary errors that occur during a preliminary examination are not a ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error. *People v Hall*, 435 Mich 599, 601; 460 NW2d 520 (1990). However, a prosecutor may not knowingly use false testimony to obtain a conviction, or knowingly allow it to stand when it appears before the jury. *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986); *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). Further, when a prosecutor knowingly presents false material testimony at a preliminary examination, understands that the witnesses will tell a significantly different story at trial, and fails to cooperate with discovery requests designed to help the defense anticipate the witness' trial testimony, reversal is required. *People v Thornton*, 80 Mich App 746, 749-750; 265 NW2d 35 (1978).

We conclude that defendant has not demonstrated a basis for relief in this case. Defendant maintains that Patrick Gentry, Darrian Mendenhall, and Amber Speed all provided false information about the circumstances of the killing at the preliminary examination. As support for this argument, defendant points to inconsistencies between the witnesses' trial testimony and their testimony at the preliminary examination. However, the mere fact that portions of the witnesses' trial testimony were inconsistent with portions of their testimony at the preliminary examination does not establish that the prosecutor knowingly presented false testimony. Indeed, upon questioning by the trial court, the prosecutor and the lead investigator,

East Lansing Police Detective David Vincent, both denied having knowledge that the witnesses' were testifying falsely at the preliminary examination. Apart from the inconsistencies in their testimony, defendant does not refer to any evidence demonstrating that the prosecutor knew that the witnesses were testifying falsely. Moreover, defendant cites no authority for the proposition that a prosecutor must disbelieve his own witnesses, or is charged with prior knowledge whenever a prosecution witness' trial testimony later differs from testimony offered at an earlier proceeding. *Lester, supra*, 232 Mich App 278-279.

Defendant also argues, however, that even if the prosecutor did not have reason to know that witnesses were testifying falsely at the preliminary examination, he "certainly" became aware of the alleged lies as immunity discussions progressed with the witnesses, and, as a result, had a duty to disclose these "lies" to defendant. Again, however, defendant points to nothing in the record, other than the inconsistencies between the witnesses' trial testimony and their preliminary examination testimony, to support this contention. Although defendant relies on the immunity agreements with witnesses Speed, Mendenhall, and Gentry as support for his claim, the fact that the prosecution sought to improve its chances of eliciting useful information from the witnesses is not the same as saying that the prosecutor knew, or should have known, that the witnesses provided material false testimony at the preliminary examination.

Defendant asserts that Gentry and Mendenhall falsely testified at the preliminary examination that the underlying debt was a gambling debt, but he fails to provide transcript citations in support of this assertion, and then later concedes on appeal that the witnesses did not mention the nature of the debt at the preliminary examination.

Furthermore, even if false testimony was presented at the preliminary examination, defendant has not demonstrated it warrants appellate relief. In instances where a prosecutor knowingly fails to correct false testimony at trial, reversal is required only if there is a reasonable likelihood that the false testimony affected the judgment of the jury. *Wiese, supra*, 425 Mich 454; *Lester, supra*, 232 Mich App 280. Here, to the extent "false" testimony was presented at the preliminary examination, it could not have affected the judgment of the jury because it was not presented at trial.

For these reasons, we reject this claim of error.

B. Immunity Agreements

In a related argument, defendant maintains that the prosecutor committed misconduct by failing to timely notify the defense of the immunity agreements with various prosecution witnesses. Defendant asserts that he was unfairly prejudiced by these surprise offers of immunity because it "crippled the ability of defense counsel to cross-examine" the witnesses regarding several issues. We disagree.

When fashioning a remedy for noncompliance with a discovery order, a trial court must first determine whether the objecting party's interest in preparing its own case or its opportunity to test the authenticity of its opponent's evidence has been prejudiced by the noncompliance, and then consider what remedy may be appropriate, giving due regard to the competing interests of the opposing party, the court, and the public. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997); *Taylor, supra*, 159 Mich App 486-487. The trial court

must also inquire into all relevant circumstances, including the reasons behind the noncompliance and whether the objecting party was in fact prejudiced. *Id.* The remedy for noncompliance should not put the objecting party in a better position than the party would have enjoyed if the discovery order had been obeyed. *Id.* at 487. Thus, the exclusion of otherwise admissible evidence should be limited to the “most egregious cases,” when other less severe remedies would fail to protect the parties’ competing interests. *Id.*

In the instant case, the prosecutor acknowledged that he failed to adequately discuss with defense counsel the immunity agreements for Gentry, Speed and Mendenhall. To remedy this defect, the trial court delayed the examination of these witnesses to allow defense counsel more time to prepare his examination of these witnesses in light of the immunity agreements. We are satisfied that the trial court properly exercised its discretion in fashioning an appropriate remedy.²

Although defense counsel raised this issue at trial, he initially sought only written reports or similar materials referencing the agreements, and an affirmation from the prosecutor and Detective Vincent that neither had reason to believe at the time of the preliminary examination that the witnesses’ testimony was false. As noted previously, the prosecutor and Detective Vincent both stated that they had no knowledge of falsity at that time. Thus, the trial court appropriately responded to defense counsel’s request for relief.

Also, all three witnesses were extensively cross-examined regarding their immunity agreements, as well as inconsistencies between their trial testimony and past testimony given. Moreover, as correctly noted by the trial court, the only material change in their testimony concerned the origin of the underlying debt. As noted previously, defendant’s actual knowledge of the nature of the debt undermines any claim of prejudice. *Taylor, supra*, 159 Mich App 486-487. Under the circumstances, this claim does not warrant appellate relief.

C. Witness Tampering

Defendant also argues that the prosecutor committed misconduct by allowing Detective Vincent to take two witnesses to the crime scene without turning over reports of this visit to the defense. Trial counsel’s only objection regarding this issue at trial was that the defense was not furnished with reports of this activity under a previous discovery request. However, defendant did not assert below, nor does he assert on appeal, that a report concerning this matter was ever generated. On appeal, defendant does not explain why this conduct should be considered improper, nor does he provide supporting authority for his position, or discuss whether the prosecutor had knowledge of Vincent’s conduct. Because defendant has failed to adequately present and discuss his argument, or cite supporting authority, we consider this issue abandoned.

² We note that the initial discussion concerning the grants of immunity for Gentry, Speed, and Mendenhall occurred on July 19, 2001. Patrick Gentry testified on July 20 and cross-examination occurred on July 20 and July 23. Amber Speed testified on July 23, and her cross-examination began on July 24, 2001. Mendenhall did not testify until July 27, and his cross-examination began on July 30. Defendant’s claim on appeal that the trial court’s remedy left defense counsel with only a three-hour break to address the matter is not supported by the record.

MCR 7.212(C)(7); *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Defendant also asserts that the prosecutor improperly sent two eyewitnesses to a psychologist. Because this matter was not raised in the trial court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). The record fails to disclose that the prosecutor was involved in the decision to send the witnesses to the psychologist. Further, defendant's claim that the witnesses were "hypnotized" into changing their trial testimony is not supported by the record. Because defendant has failed to demonstrate plain error, this unpreserved issue is forfeited.

D. Discovery Violations

Defendant next argues that the prosecutor improperly disposed of the Range Rover vehicle in which Rogers was shot, thereby preventing the defense from examining it. Defendant concedes that this matter was not raised in the trial court. Therefore, defendant must show that a plain error affected his substantial rights. *Carines, supra*, 460 Mich 763. The record indicates that defense counsel was furnished with photographs of the vehicle and other evidence categorizing the search of the vehicle for ballistics evidence and summarizing the police expert's conclusions. On appeal, defendant does not explain how he was prejudiced from not being able to examine the vehicle himself, apart from asserting that further examination or testing by his own expert *may* have provided exculpatory evidence. Defendant's nonspecific assertion that further testing *may* have led to exculpatory evidence is insufficient to establish either a plain error or that his substantial rights were affected.

Defendant further complains that other discovery violations denied him a fair trial. Defendant's only claim of prejudice stemming from the alleged untimely disclosure of these other items is that he "could not effectively choose a defense theory under which to proceed." This general allegation of prejudice is insufficient to show that defendant was actually prejudiced at trial. Because defendant has failed to sufficiently develop his argument, or provide factual support for his assertion that the prosecutor deliberately withheld information, we consider this issue abandoned. MCR 7.212(C)(7); *Kevorkian, supra*, 248 Mich App 389; *Jones (On Rehearing), supra*, 201 Mich App 456-457.

In sum, defendant has failed to demonstrate that he is entitled to a new trial because of misconduct by the prosecutor.

IV. Demonstrative Evidence

Defendant next argues that the trial court erred when it allowed the prosecutor to present as demonstrative evidence a rifle that allegedly matched the type used to kill Rogers. We disagree. Demonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may assist the trier of fact in reaching a conclusion on a matter material to the case. *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). A weapon similar to one allegedly used in the commission of a crime may be admitted as demonstrative evidence where: (1) substantial evidence attests to the similarity of the exhibit offered to the weapon allegedly used, (2) there is no reasonable likelihood that the jury

may fail to understand the demonstrative nature of the evidence, and (3) the opposing party has ample opportunity for cross-examination regarding the demonstrative weapon. *Id.* at 444-445. Here, defendant was permitted to cross-examine the prosecution's ballistics expert and other witnesses about the demonstrative weapon, and the physical evidence found at the crime scene was consistent with the type of weapon. To the extent some of the witnesses' preliminary examination testimony about the weapon they saw in defendant's possession may have been inconsistent, those inconsistencies were for the jury to consider and resolve. Defendant has failed to show that the trial court abused its discretion in allowing the prosecutor to introduce the demonstrative weapon to the jury.

Defendant next argues that the trial court abused its discretion by allowing prosecution witnesses to provide descriptions and a drawing of the weapon they observed in defendant's possession. We disagree.

We initially note that, although defendant argues that the identification testimony was irreparably tainted because an investigating officer had shown the witnesses the demonstrative weapon mentioned previously, defendant has failed to cite authority in support of his argument that this was improper. Therefore, we may consider the issue abandoned. MCR 7.212(C)(7); *Kevorkian, supra*, 248 Mich App 389; *Jones (On Rehearing), supra*, 201 Mich App 456-457. In any event, there is no merit to defendant's claim. See CJI2d 5.3; *Davis v Dow Corning Corp*, 209 Mich App 287, 293; 530 NW2d 178 (1995), citing *Domako v Rowe*, 438 Mich 347, 361-362; 475 NW2d 30 (1991); MRE 612.

With regard to the trial court's decision to allow the witnesses to describe the weapon they saw in defendant's possession, although the trial court erred in its analysis, its result was correct. The trial court erroneously compared the situation to one involving a witness' identification of a defendant at a suggestive identification procedure, see, e.g., *People v Kurylczyk*, 443 Mich 289, 306 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993), and refused to allow the witnesses to use the demonstrative weapon as an aid while testifying. However, "the risks inherent in a misidentification of inanimate objects produced in the thousands are not the same as the risks of misidentification of unique human beings." *People v Miller (After Remand)*, 211 Mich App 30, 41; 535 NW2d 518 (1995). Any suggestiveness in the identification of inanimate objects is relevant to the weight, not the admissibility, of the evidence. *Id.* Thus, it would have been proper to allow the witnesses to testify with the aid of the demonstrative weapon. Although the court did not permit the witnesses to use the demonstrative weapon as an aid while testifying, it certainly was not improper to allow the witnesses to verbally describe the weapon they observed in defendant's possession. For the same reasons, the trial court did not abuse its discretion in allowing Speed to testify regarding a drawing of the weapon that she prepared during trial, where she testified that the drawing resembled the weapon that she saw in defendant's possession. Any suggestiveness was a matter of weight, not admissibility. *Id.*

V. Instructional Error

Defendant next argues that the trial court erred when it instructed the jury on second-degree murder as follows:

The defendant is alternatively charged with second degree murder. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused the death of Shemika Rogers, that is, *that Shemika Rogers died as a result of being shot.*

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

Either he intended to kill or he intended to do great bodily harm to Shemika Rogers 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. (emphasis added.)

Although defendant argues that the italicized portion of the instruction is erroneous, because it is not enough that the prosecutor prove that Rogers died as a result of being shot, defendant improperly attempts to read the instruction in isolation. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instruction as a whole adequately conveyed the essential element of causation, i.e., that the decedent's death was a consequence of defendant's actions rather than an independent intervening cause in which defendant did not participate and could not foresee. See CJI2d 16.5; *People v Bailey*, 451 Mich 657, 669, 676; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996); *People v Bowles*, 234 Mich App 345, 349-350; 594 NW2d 100 (1999). The trial court's other instructions further reinforced this concept. We thus find defendant's claim of error to be without merit. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997).

VI. Great Weight and Sufficiency of the Evidence

Defendant next argues that the trial court erred by denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence. We disagree.

“A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). “[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of [c]redibility.” *Id.*, 642. Even when “testimony supporting the verdict has been impeached, if ‘it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,’ the credibility of witnesses is for the jury.” *Id.*, 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942). Examples of such situations are where witness testimony contradicts indisputable physical facts or laws, testimony that is both “material and so inherently implausible that it could not be believed by a reasonable juror,” or “testimony that has been seriously ‘impeached’ and the case marked by ‘uncertainties and discrepancies.’” *Lemmon, supra*, 456 Mich 644, quoting *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992), and *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985), respectively.

This Court gives substantial deference to a trial court's determination that a verdict is not against the great weight of the evidence. *Arrington v Detroit Osteopathic Hosp Corp (On*

Remand), 196 Mich App 544, 560; 493 NW2d 492 (1992). Here, defendant has not demonstrated that the trial court abused its discretion by denying defendant's motion. Defendant's argument is predicated in large part upon a restatement of his other claims of error, which we have already rejected. In particular, defendant reiterates his position that the witnesses changed their versions of events after "being manipulated by the government" though the use of immunity grants and other actions, and then points to inconsistencies in the testimony of different witnesses to support his claim that the testimony was impeached and inherently implausible, and that either Mendenhall or Gentry actually shot and killed Rogers.

We reject defendant's invitations to reassess witness credibility and reinterpret the evidence. These were functions for the jurors, who were able to view the witnesses' demeanor, tonal quality, and speech patterns in the face of sometimes heated cross-examination, and were in a better position to determine who was telling the truth. *Lemmon, supra*, 456 Mich 646. The evidence did not point toward defendant's innocence or Gentry's and Mendenhall's guilt. Contrary to defendant's assertion on appeal, even the testimony of Rogers' son corroborated the testimony given by Gentry and Mendenhall, and supported the prosecutor's theory that a third person, defendant, shot Rogers while Mendenhall and Gentry tried to question her about Kennard. The trial court did not abuse its discretion by denying defendant's motion for a new trial.

Defendant's claim that the evidence was insufficient to support a conviction for second-degree murder is without merit. To prove second-degree murder, the prosecutor was required to must prove that defendant caused Rogers' death with malice and without justification, mitigation or excuse. *Bailey, supra*, 451 Mich 669. Malice can be shown by an intent to kill, an intent to inflict great bodily harm, or the intent to create a very high risk of death with knowledge that the act probably would cause death or great bodily harm. *Id.*

Defendant argues that the evidence was insufficient because the prosecutor failed to link the bullet that killed Rogers to a gun held by either himself or codefendant Jones. We disagree. "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). Here, Speed testified that she saw defendant fire a rifle into Rogers' car. The rifle was similar to a weapon that was consistent with the bullet slugs recovered from Rogers' body and the shell casings found at the crime scene. This evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant fired the shot that killed Rogers. Further, defendant's conduct of shooting a gun into the occupied car was sufficient to establish the necessary element of malice. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998); *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).

VII. Ineffective Assistance of Counsel

Defendant lastly argues that trial counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914, 927 (2002); *People v Rodgers*,

248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *Id.*, 76-77. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Id.*

Defendant first raises a number of evidentiary matters concerning the investigation of the physical evidence in connection with the shooting. He claims that counsel was ineffective for failing to consult with or call an expert to challenge the ballistics testimony, failing to consult or call an expert to challenge the crime scene and vehicle testimony, and failing to develop or preserve the record regarding the Range Rover. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *Rockey, supra*, 237 Mich App 76.

Defendant's mere assertion that a defense ballistics expert "could have contradicted Pope's testimony that the gun must have been a Hi Point model 995 rifle" is purely speculative and lacks factual support. Similarly, defendant has provided nothing other than unsupported allegations to support his claims of deficient performance with respect to the failure to examine the Range Rover and failure to retain an expert to investigate the angle of entry of the bullets. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has failed to meet this burden.

Defendant also claims that counsel failed to adequately explore Amber Speed's vision disorder, amblyopia, failed to cross-examine her about her visual acuity, and failed to obtain her medical records. However, defendant has failed to define this condition, discuss whether defense counsel could, in fact, review Speed's medical records, discuss counsel's alleged deficiencies in light of Speed's initial responses to questions concerning her vision, or show how the cross-examination would likely have affected the outcome of the case. As such, he has failed to establish that counsel was ineffective.

Defendant next argues that counsel was ineffective for failing to object to the testimony of two witnesses, who defendant maintains were hypnotized. As previously discussed, the record does not support defendant's claim that the witnesses were hypnotized. Therefore, we reject this claim of ineffectiveness.

Finally, defendant argues that trial counsel erred by failing to object to the allegedly improper jury instruction discussed above. As discussed previously, however, viewed as a whole, the court adequately instructed the jury on the element of causation. See CJI2d 16.5. Counsel was not ineffective for failing to object. *People v Hawkins*, 245 Mich App 439, 456-457; 628 NW2d 105 (2001).

In sum, defendant has failed to establish that defense counsel was ineffective.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Peter D. O'Connell